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Suspending Habeas Corpus: Article I, Section 9, Clause 2, or the United States Constitution and the War on Terror

Cover Page Footnote

J.D. Candidate, May 2006, Fordham University School of Law. The author would like to thank Stephanie Keith, Karl and Erna Ekeland, Christopher and Margaret Keith, Professor Martin Flaherty, Professor Charles Kelbley, Professor Michael M. Martin, the Honorable Charles P. Sifton, and the Fordham Law Library for their support and assistance.

SUSPENDING HABEAS CORPUS: ARTICLE I, SECTION 9, CLAUSE 2, OF THE UNITED STATES CONSTITUTION AND THE WAR ON TERROR

*Tor Ekeland**

"We believe that the worst thieves in the world today and the worst terrorists are the Americans. Nothing could stop you except perhaps retaliation in kind. We do not have to differentiate between military or civilian. As far as we are concerned, they are all targets."¹

"[T]he practice of arbitrary imprisonments, has been, in all ages, the favorite and most formidable instruments of tyranny."²

INTRODUCTION

The United States Constitution is built as much for war as it is for peace.³ The Constitution has aptly been described as "a *fighting* constitution."⁴ Only one provision in the Constitution explicitly provides for a major difference between wartime and peacetime rights.⁵ Article I, Section 9,

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1. The 9/11 Comm'n, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* 47 (authorized ed. 2004) [hereinafter *The 9/11 Report*] (quoting Usama Bin Laden).

2. *The Federalist* No. 84, at 480 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

3. Security issues are mentioned three times alone in the Preamble. "[The Constitution is intended to] insure domestic Tranquility, provide for the common defence . . . and secure the Blessings of Liberty . . ." U.S. Const. pmbl. After Article I deals with the procedural issues of electing members of the House and Senate, taxation for the "common Defence" is one of Congress' first enumerated powers. U.S. Const. art. I, § 8, cl. 1. This was done because, although the Articles of Confederation granted war-making powers to Congress, the powers were useless without a way of obtaining mandatory financing from the states. See U.S. Arts. of Confederation, arts. VI, ¶ 5, VIII; Richard H. Kohn, *The Constitution and National Security: The Intent of the Framers*, in *The United States Military Under the Constitution of the United States, 1789-1989*, at 61-62 (Richard H. Kohn ed., 1991). Eight of the nineteen paragraphs in Article I, Section 8, of Congress's positive enumerated powers deal with war in some manner. After the procedural requirements for election of the President are enumerated in Article II, the first positive power of the President listed is the war-making power. See U.S. Const. art. II, § 2.

4. Clinton Rossiter, *The Supreme Court and the Commander in Chief* 91 (Richard P. Longaker ed., 1976) (quoting Chief Justice Charles Evans Hughes).

5. The Third Amendment also provides for differential rights in peace and war, but the Third Amendment has never been directly litigated in front of the United States Supreme

Clause 2 of the Constitution (the "Suspension Clause") allows for the suspension of "The Privilege of the Writ of Habeas Corpus"⁶ when in "Cases of Rebellion or Invasion the public Safety may require it."⁷ Some believe that suspension of habeas corpus eliminates the constitutional due process rights of the detained.⁸ As such, the Suspension Clause is one of the more extreme forms of war power in the Constitution, because due process has been the cornerstone of the Anglo-American legal system for almost a millennium.⁹ Recently, Justice Antonin Scalia argued in *Hamdi v.*

Court and there is only one case on point in the history of the lower federal courts. Tom W. Bell, *The Third Amendment: Forgotten but Not Gone*, 2 Wm. & Mary Bill Rts. J. 117, 140 (1993). The Third Amendment reads, "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. Const. amend. III. The Fifth Amendment also makes an exception to the requirement of indictment by grand jury in capital crimes for "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." U.S. Const. amend. V.

6. The phrase "habeas corpus" is Latin for "that you have the body" and one use of the writ at common law was to direct a detainor to produce a detainee to the issuing court so that court could assess the legality of the detention. Black's Law Dictionary 728 (8th ed. 2004). Generally, after a petition for habeas corpus has been filed with a court, the court either directs the writ or an order to show cause at the detainor. See 28 U.S.C. §§ 2241-2255 (2000) (federal habeas corpus jurisdiction and procedure). There are procedural differences on how and when the writ was historically issued, depending on if the writ was functioning as a way to bail a prisoner or as a way of ordering the detainor to appear before the courts. Compare 28 U.S.C. § 2243 (federal habeas corpus procedure), with *infra* note 40 and accompanying text. This procedural disparity is evident in the federal habeas corpus statutes, which allow for a court to direct either the writ or an order to show cause at the detainor. 28 U.S.C. § 2243. Historically, at common law, there were the following writs of habeas corpus: *habeas corpus ad deliberandum et recipiendum*, "[a] writ used to remove a person for trial from one county to the county where the person allegedly committed the offense"; *habeas corpus ad faciendum et recipiendum*, "[a] writ used in civil cases to remove the case, and also the body of the defendant, from an inferior court to a superior court"; *habeas corpus ad prosequendum*, "[a] writ used in criminal cases to bring before a court a prisoner to be tried on charges other than those for which the prisoner is currently being confined"; *habeas corpus ad respondendum*, "[a] writ used in civil cases to remove a person from one court's custody into that of another court, in which the person may then be sued"; *habeas corpus ad satisfaciendum*, "[a] writ used to bring a prisoner against whom a judgment has been entered to some superior court so that the plaintiff can proceed to execute that judgment"; *habeas corpus ad subjiciendum*, "[a] writ directed to someone detaining another person and commanding that the detainee be brought to court"; *habeas corpus ad testificandum*, "[a] writ used in civil and criminal cases to bring a prisoner to court to testify." Black's Law Dictionary, *supra*, at 728; see also *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 97-100 (1807) (discussing common law habeas corpus); *infra* Part I.E.1 (discussing *Ex parte Bollman*). Unless otherwise specified, the phrase "habeas corpus" is used interchangeably in this Note to refer to both the functioning of the writ as a means of review and as a means of bailing or freeing a detainee.

7. U.S. Const. art. I, § 9, cl. 2.

8. See, e.g., *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2665-66 (2004) (Scalia, J., dissenting) ("When the writ is suspended, the Government is entirely free from judicial oversight."). But see *infra* notes 156-60 and accompanying text.

9. See, e.g., Magna Carta (1215), available at <http://www.bl.uk/collections/treasures/magnatranslation.html>.

Rumsfeld that, if the government wishes to avoid judicial scrutiny of its War on Terror¹⁰ detentions, habeas corpus should be suspended.¹¹

Habeas corpus functions as a minimal guarantor of due process by requiring, upon issuance of the writ or an order to show cause, an executive detainor to justify the legality of the petitioner's detention.¹² The writ has historically been used as both a means of obtaining review for a detainee and as a way for a court to grant bail or freedom to that detainee after review of the detention's legality.¹³

Congress has not explicitly suspended the privilege of the writ of habeas corpus for the War on Terror, and individual detainees in the War on Terror have filed petitions for habeas corpus in the federal courts.¹⁴ Many of these petitions contain arguments that the President has violated the Suspension Clause by denying detainees review of the legality of their detentions.¹⁵

Judicial review of executive detentions in the War on Terror has come under harsh criticism from members of the Executive Branch.¹⁶ The criticism is that judicial oversight of the executive's actions in the War on Terror hampers the war effort and ultimately is dangerous to national security.¹⁷ If this view is correct, it is sensible from a national security standpoint to suspend judicial review of War on Terror detentions. One constitutionally explicit way to suspend judicial review, at least according to Justice Scalia, is to have Congress suspend habeas corpus.¹⁸ Assuming Justice Scalia's Suspension Clause interpretation is correct, and suspension abrogates judicial review of executive detentions, does the threat posed by Al Qaeda warrant suspension?

10. The "War on Terror" refers to the current conflict between the United States and Islamic militants seeking to establish a global caliphate. *See infra* note 19.

11. *Hamdi*, 124 S. Ct. at 2671.

12. *See infra* Part I.A; *see also* 28 U.S.C. §§ 2241-2255 (2000) (federal habeas corpus jurisdiction and procedure).

13. *See supra* note 6.

14. *E.g.*, *Hamdi*, 124 S. Ct. at 2633; *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004); *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28 (D.D.C. 2004); *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004).

15. *See supra* note 14.

16. *E.g.*, Dan Eggen, *Ashcroft Decries Court Rulings; 'Second-Guessing' Bush on Security Raises Risk, He Says*, Wash. Post, Nov. 13, 2004, at A6. Former Attorney General John Ashcroft has described the problem as follows:

The danger I see here is that intrusive judicial oversight and second-guessing of presidential determinations in these critical areas can put at risk the very security of our nation in a time of war," Ashcroft said in a speech at the Federalist Society's national convention. He added later: "Our nation and our liberty will be all the more in jeopardy as the tendency for judicial encroachment and ideological micromanagement are applied to the sensitive domain of national defense."

Id.

17. *See supra* note 16.

18. *Hamdi*, 124 S. Ct. at 2671 (Scalia, J., dissenting).

The threat from Al Qaeda and other loosely affiliated terrorist organizations is real and long-term.¹⁹ Al Qaeda has already launched several successful attacks against U.S. targets, and its propaganda is a constant exhortation to attack the United States' interests and inflict maximum human and economic casualties.²⁰ Despite this, some commentators have questioned whether Al Qaeda is a threat to the existence of the United States and believe that the emergency detention powers being claimed by the President in the War on Terror are more dangerous to the Republic than any terrorist threat, because of the possibility that they will lead to a dictatorship.²¹

Suspicion of unilateral executive power is an old fear in American constitutional history, and was memorably expressed at the Federal Constitutional Convention by the argument that concentration of power into the hands of a single president would result in the "foetus of a monarchy."²² In light of this age-old fear of an abusive executive power, this Note asks a number of related questions whose answers depend on interpreting the Suspension Clause jurisdictionally and procedurally.

There is more than one possible interpretation of what the Suspension Clause means and how it functions, the result of textual and historical ambiguities. Is it the privilege of the writ, or the writ itself, that can be suspended in times of rebellion or invasion? The common law suggests the former, and so some Supreme Court cases argue.²³ Does the Suspension Clause grant constitutional habeas corpus jurisdiction that Congress cannot encroach, or is jurisdiction dependent upon congressional statutory

19. Al Qaeda means "the base." TerrorismFiles.Org, Terrorist Organizations: al-Qa'ida (Al Qaeda), http://www.terrorismfiles.org/organisations/al_qaida.html (last visited Oct. 25, 2005). Al Qaeda's avowed aim is to establish a global Islamic caliphate, a long-term project it sees as taking generations. Al Qaeda views itself as the foundation upon which this new Islamic caliphate will be built over the next few centuries, a caliphate that will be a "severe and repressive fourteenth century literalist theocracy." Richard A. Clarke, *Against All Enemies: Inside America's War on Terror* 35 (2004).

20. Al Qaeda involvement in attacks against U.S. targets, either directly or indirectly, include the following: the "Black Hawk Down" incident in Sudan (October 1993); a car bombing in Saudi Arabia killing five Americans (November 1995); a plot to blow up airplanes over the Pacific (1995); the Khobar Towers bombing in Saudi Arabia (June 1996); two airplanes flown into the north and south towers at the World Trade Center in New York City, resulting in their collapse and the deaths of almost 3000 people (September 11, 2001); one airplane flown into the Pentagon (September 11, 2001); and a passenger-averted airplane attack on possibly the Capitol or White House (September 11, 2001). The 9/11 Report, *supra* note 1, at 59-60. Al Qaeda has also attempted to buy weapons-grade uranium. *Id.* at 60. For Usama Bin Laden's propaganda efforts, see, e.g., Craig Whitlock, *From Bin Laden, Different Style, Same Message; In Latest Tape, Al Qaeda Leader Dropped Koranic Verses in Favor of Direct Appeal to U.S. Public*, Wash. Post, Nov. 25, 2004, at A20.

21. See, e.g., Bruce Ackerman, *The Emergency Constitution*, 113 Yale L.J. 1029 (2004) (arguing that the President's War on Terror powers should be contingent on repeated congressional authorizations that require ever-increasing majority votes).

22. 1 The Records of the Federal Convention of 1787, at 66 (Max Farrand ed., 1966) [hereinafter Farrand] ("Mr. Randolph strenuously opposed a unity in the Executive magistracy. He regarded it as the foetus of monarchy.").

23. See *infra* Part I.E.2-3.

authorization? Does suspension necessarily mean that there can be no judicial review of an executive detention? This was not the case in the Civil War.²⁴ Who can suspend? Constitutionally, it seems to have been delegated to Congress by its placement (last minute) in Article I, and at common law it was the prerogative of the legislature.²⁵ But in American history it has always been the executive who actually suspends, with or without congressional authorization.²⁶ And again, even if a definitive interpretation of the Suspension Clause is to be had, does the threat posed by Al Qaeda meet the clause's threshold requirements of rebellion or invasion, strictly or liberally construed?

Part I of this Note briefly describes the common law history of the writ of habeas corpus and its suspension, before moving on to the background and development of the Suspension Clause at the Federal Constitutional Convention and the emergence of a federal writ of habeas corpus during the antebellum period. Following this, Part I surveys the major jurisdictional and procedural cases involving the Suspension Clause up through the War on Terror. Part II then examines the two possible readings of the Suspension Clause; the jurisdictional questions raised by the clause, including whether suspension bars judicial review of detentions; and the technical problems involved with invoking the clause for the War on Terror. Part III argues that the Suspension Clause is a constitutional grant of federal habeas corpus jurisdiction, that the suspension of the privilege of the writ does not entail executive freedom from judicial oversight, and that habeas corpus should be suspended for the War on Terror.

I. BACKGROUND

The privilege of the writ of habeas corpus is the only explicitly designated privilege in the United States Constitution.²⁷ Some conclude from this that habeas corpus is a constitutionally guaranteed privilege and that federal court habeas corpus jurisdiction requires no congressional authorization.²⁸ Others believe that federal habeas corpus jurisdiction is predicated on congressional authorization.²⁹

At common law, habeas corpus evolved as a judicial writ, and legislative involvement throughout its history has been limited to either jurisdictional

24. See *infra* Part I.E.2-3.

25. See *infra* Part I.A-C.

26. See *infra* Part I.E.2.

27. U.S. Const. art. I, § 9, cl. 2. This is notable because of the important role that privileges and immunities play in the Constitution as a whole. See U.S. Const. art. IV, § 2, cl. 1; U.S. Const. amend. XIV, § 1.

28. See, e.g., Badshah K. Mian, *American Habeas Corpus: Law, History, and Politics* 189-97 (1984) (arguing that the "Suspension [C]ause provides for a presumption that habeas jurisdiction exists"). See *infra* Part III.A for an argument that habeas corpus jurisdiction is constitutionally conferred. See also *infra* Parts I.E.2-3 for early historical versions of this argument.

29. See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 339-40 (2001) (Scalia, J., dissenting).

or suspension matters.³⁰ The writ is not a legislative creation. Despite this, Justice John Marshall held early on that congressional authorization was required for federal court jurisdiction to issue the writ.³¹ Because of this, habeas corpus jurisdiction and procedure in the United States have evolved judicially under the parameters of (or through clashes with)³² congressional statutes.³³

Habeas corpus was already highly developed in Anglo-American jurisprudence by the time of the Federal Constitutional Convention.³⁴ The insertion of the Suspension Clause³⁵ in the Constitution seems to have been done not so much out of a concern to guarantee habeas corpus (although there was some discussion of this) as to make sure that habeas corpus could be suspended in the face of threats like Shays' Rebellion.³⁶

Whatever the motive behind the Suspension Clause, suspension of habeas corpus because of national security concerns has been a rare occurrence in United States history.³⁷ Petitions for a writ of habeas corpus by those detained by the executive during national security crises, however, have been common.³⁸ Before examining the history of the Suspension Clause in the United States, a cursory survey of the development of habeas corpus in England is in order.

A. *The Historical Emergence of Habeas Corpus in the English Legal System*

The term "habeas corpus" was commonplace in the civil procedure of thirteenth-century England.³⁹ By the sixteenth century, the writ's *ad subjiciendum* form,⁴⁰ the form by which the legality of an executive detention may be challenged, had emerged from the jurisdictional struggles between the common law and equity courts primarily as a way for the common law courts to release detainees held under a Court of Chancery injunction.⁴¹ Thus, the writ has been associated with jurisdictional struggles since its inception.

30. See Robert J. Sharpe, *The Law of Habeas Corpus* 1-18, 91-96 (1976).

31. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807); see *infra* Part I.E.1 (discussing *Ex parte Bollman*).

32. See, e.g., *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869); *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868).

33. E.g., 28 U.S.C. §§ 2241-2256 (2000) (defining modern habeas corpus jurisdiction and procedure); *id.* §§ 2261-2265 ("Special Habeas Corpus Procedure in Capital Cases"); Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82 (codified as amended at 28 U.S.C. §§ 2241-2256 (2000)) (granting habeas corpus jurisdiction to the federal courts).

34. See *infra* Part I.A.

35. U.S. Const. art. I, § 9, cl. 2.

36. See *infra* note 63 and accompanying text.

37. See *infra* Part I.D.

38. See *infra* Part I.E.

39. Sharpe, *supra* note 30, at 1.

40. See *supra* note 6.

41. Sharpe, *supra* note 30, at 4-8. As Sharpe notes, "Chancery often granted injunctions to restrain the enforcement of a common law judgement which violated the principles of

1. *Darnel's Case*

*Darnel's Case*⁴² marked the emergence of the writ of habeas corpus as a way to challenge the legitimacy of an executive detention. In 1627, Charles I detained subjects that refused to contribute to a loan needed to fund a war with France and Spain.⁴³ At the time of *Darnel's Case*, there was "little doubt that the sovereign had long exercised a power of arbitrary committal where there was thought to be a threat to the safety of the realm."⁴⁴ However, when judges refused to bail the prisoners, widespread outrage at the decision led to the Petition of Right of 1628,⁴⁵ which prohibited imprisonment without express charges.⁴⁶

In 1629, Charles I began flouting habeas corpus despite the Petition of Right.⁴⁷ This led to the passage of the Habeas Corpus Act of 1640⁴⁸ (which also abolished the infamous Star Chamber).⁴⁹ The Habeas Corpus Act of 1640 was ineffective, and was eventually replaced by the Habeas Corpus

equity, and the common law courts fought back by releasing on habeas corpus anyone committed for breach of an injunction." *Id.* at 6 (citation omitted).

42. (1627) 3 How. St. Tr. 1 (K.B.).

43. Sharpe, *supra* note 30, at 9; see also *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2662 (2004) (Scalia, J., dissenting) (discussing *Darnel's Case* generally).

44. Sharpe, *supra* note 30, at 10 (citation omitted).

45. The Petition of Right of 1628, 3 Car. 1, c. 1 (Eng.).

46. *Hamdi*, 124 S. Ct. at 2662. Judge Robert Sharpe questions the legal impact of the Petition of Right:

There is some doubt about the formal legal nature of the Petition of Right. It does not take the form of an ordinary statute, nor is it strictly an ordinary petition of right. It seems to have been the product of compromise, and was probably considered at the time to be a declaration of the law given by the two Houses of Parliament in their judicial capacity and endorsed by the King . . . [T]here probably was a genuine feeling that the Petition did not enact new laws so much as reassert old ones.

Sharpe, *supra* note 30, at 13.

[The Petition of Right] was not [passed], as is supposed, because of the ship-money and [Darnel's Case] It was because King Charles had quartered in the town of Plymouth, and in the County of Devon, certain soldiers in time of peace, upon the inhabitants thereof; and had issued his commission that those counties should be governed by 'martial law,' while the soldiers, in time of peace, were quartered there, and therefore came the Petition cited.

Ex parte Milligan, 71 U.S. (4 Wall.) 2, 98 (1866).

47. Sharpe, *supra* note 30, at 13-15.

48. *Id.* at 15.

49. *Id.* The Star Chamber was a court of law that evolved out of the medieval period and in 1487 became its own court, separate from the King's Council:

The power of the court of Star Chamber grew considerably under the Stuarts, and by the time of Charles I it had become a byword for misuse and abuse of power by the king and his circle. James I and his son Charles used the court to examine cases of sedition, which, in practice, meant that the court could be used to suppress opposition to royal policies. It became used to try nobles too powerful to be brought to trial in the lower courts. Court sessions were held in secret, with no right of appeal, and punishment was swift and severe to any enemy of the crown.

Britain Express: The Court of the Star Chamber,
<http://www.britainexpress.com/History/tudor/star-chamber.htm> (last visited Oct. 20, 2005).

Act of 1679,⁵⁰ where the "Great Writ" of habeas corpus emerged in the form the framers of our Constitution recognized, as a writ by which the legality of an executive detention could be challenged.⁵¹

2. The Habeas Corpus Suspension Acts

In 1688, the British Parliament passed the first of many habeas corpus suspension acts, all of which essentially had the same content.⁵² The acts allowed for the suspension of the privilege of the writ for a period of time usually limited to one year, and "gave no power to arrest or detain any person other than on a charge of treason."⁵³ Under the suspension acts, a court could still issue a writ of habeas corpus to determine the sufficiency of the warrant authorizing the detention, or to examine if the detention properly fell under the legislation authorizing the suspension.⁵⁴ Thus it was not so much the writ itself that was suspended, but the privilege of relief that could be obtained through the writ.⁵⁵ This suspension was always the prerogative of the legislature, and not the executive.⁵⁶ At the Federal Constitutional Convention, national security concerns motivated the framers to provide for this prerogative.

B. The National Security Context of the Suspension Clause at the Federal Constitutional Convention

On May 14, 1787, when the Federal Constitutional Convention assembled, the United States faced substantial threats to its security on all sides. To the north, the British were still present in Canada and collaborating with the Native Americans in an attempt to stop the westward expansion of the Americans.⁵⁷ To the south and west, Spain controlled both Florida and Louisiana.⁵⁸ Spain was unhappy about American expansion in the Mississippi Valley and controlled the Mississippi Delta.⁵⁹ The United States also had trouble protecting its ship-borne commerce from

50. The Habeas Corpus Act of 1679, 31 Car. 2, c. 2 (Eng.).

51. See Sharpe, *supra* note 30, at 19.

52. *Id.* at 91; e.g., The Habeas Corpus Suspension Act of 1688, 1 W. & M., c. 7 (Eng.).

53. See Sharpe, *supra* note 30, at 92.

54. See *id.*

55. See *id.*

56. *Id.* at 91.

57. Kohn, *supra* note 3, at 65.

58. *Id.*

59. *Id.* "Let us take a review of the variety of important objects, which must necessarily engage the attention of a national government. You have to protect your rights against Canada on the north, Spain on the south, and your western frontier against the savages." 1 Farrand, *supra* note 22, at 297 (quoting Alexander Hamilton, introducing his constitutional plan on June 18, 1787).

pirates, particularly along the Barbary Coast.⁶⁰ Furthermore, there was a pronounced threat from the western Native American tribes.⁶¹

Not only were there external threats, but there were also internal threats.⁶² The domestic insurrection known as Shays' Rebellion⁶³ brought matters to a head in the summer of 1786 and became a major impetus, both for the Federal Convention and for the creation of the Suspension Clause.⁶⁴

60. Kohn, *supra* note 3, at 65-66.

61. *Id.* at 66 ("On both the northern and southern frontiers lay powerful tribes directly in the path of white expansion, some large and cohesive like the Creeks and Cherokees, others the remnants of eastern tribes driven out or displaced by earlier white encroachment.").

62. *Id.* at 64. "Threats" is construed here as threats to the interests of the framers. For a classic analysis of those interests, see generally Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* 73-151 (The Free Press 1986) (1913).

63. Kohn, *supra* note 3, at 69-70 ("Congress watched helplessly during the summer and fall of 1786 as Shays' Rebellion erupted in western Massachusetts and seemed to threaten similar outbursts elsewhere in New England and in the backcountries of other regions."). Shays' Rebellion was a revolt by debtor farmers in western Massachusetts against their urban creditors, who dominated the Massachusetts Legislature in Boston. For a general account of Shays' Rebellion, see Howard Zinn, *A People's History of the United States* 91-95 (1999).

64. James Madison, *Notes of Debates in the Federal Convention of 1787*, at 13 (Adrienne Koch ed., 1987) (1893) ("[A]mong the ripening incidents was the Insurrection of Shays, in Mass[achusetts] against her Gov[ernment]; which was with difficulty suppressed, notwithstanding the influence on the insurgents of an apprehended interposition of the Fed[er]al troops." (quoting Madison's preface to his notes)). For discussion of Shays' Rebellion at the Constitutional Convention, see 1 Farrand, *supra* note 22, at 18 ("[When the Articles of Confederation were drafted] no rebellion had appeared as in Mass[achusetts]" (quoting Edmond Randolph on May 29, 1787)); *id.* at 48 ("The people do not want virtue; but are the dupes of pretended patriots. In Mass[achusetts] it has been fully confirmed by experience that [the people] are daily misled into the most baneful measures and opinions by the false reports circulated by designing men, and which no one on the spot can refute." (quoting Elbridge Gerry on May 31, 1787)); *id.* at 285 ("A certain portion of military force is absolutely necessary in large communities. Mass[achusetts] is now feeling this necessity & making provision for it. But how can this force be exerted on the States collectively. It is impossible. It amounts to a war between the parties. Foreign powers also will not be idle spectators. They will interpose, the confusion will increase, and a dissolution of the Union ensue." (quoting Alexander Hamilton on June 18, 1787)); *id.* at 318 ("The insurrections in Mass[achusetts] admonished all the States of the danger to which they were exposed." (quoting James Madison on June 19 1787)); *id.* at 406-07, 414 ("Mass[achusetts] can not keep the peace one hundred miles from her capitol and is now forming an army for its support." (quoting Oliver Ellsworth on June 25, 1787)); *id.* at 423 ("[S]ymptoms of a leveling spirit, as we have understood, have sufficiently appeared in a certain quarters to give notice of the future danger." (quoting James Madison on June 26, 1787)); *id.* at 437 ("[H]e did not conceive the instances mentioned by Mr. M[adison] of compacts [sic] between Va. & Md. between Pa. & N.J. or of troops raised by Mass[achusetts] . . . to be violations of the articles of confederation . . ." (quoting John Rutledge on June 27, 1787)); 2 *id.* at 317 ("Mr. Gerry was ag[ainst] letting loose the myrmidons of the U[nited] States on a State without its own consent. The States will be the best Judges in such cases. More blood would have been spilt in Mass[achusetts] in the late insurrection, if the Gen[er]al authority had intermeddled." (quoting Elbridge Gerry on August 17, 1787)); *id.* at 332 ("He had however but a scanty faith in Militia. There must be <also> a real military force—This alone can <effectually answer the purpose.> The United States had been making an experiment without it, and we see the consequence in their rapid approaches toward anarchy." (quoting Charles Pinkney on August 18, 1787)); *id.* at 626-27 ("In Massachusetts, one assembly would have hung all the insurgents in that State: the next

National security was very much on the framers' minds when they met in Philadelphia in 1787.⁶⁵

These national security concerns led to the U.S. Constitution's centralization of military power in the federal government, and this shift weakened the military power of the states. States lost the power to keep troops in peacetime and to wage war, except when invaded or in imminent danger.⁶⁶ The states also lost a significant amount of control over their militias under constitutional provisions mandating federal control of the militia during invasion, and granting the federal government the power to execute the laws of the union and to suppress insurrection.⁶⁷ Furthermore, the federal government gained the power to pay for and organize state militias.⁶⁸ Finally and foremost, the Constitution gave the federal government the right to raise armies and navies, creating armed forces independent of the states.⁶⁹ The Suspension Clause was part of this centralization of military power in the federal government.

C. The Development of the Suspension Clause

The framers believed that it would be necessary to suspend the writ of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it."⁷⁰ The initial version of the Suspension Clause required

was equally disposed to pardon them all. He suggested the expedient of requiring the concurrence of the Senate in Acts of Pardon." (quoting Rufus King on September 15, 1787).

65. On May 29, 1787, the ability to defend against foreign invasion was the first property of the new government proposed in the Virginia Plan. 1 Farrand, *supra* note 22, at 18-23 (Edmond Randolph's statements in Madison's Notes); *id.* at 23-24 (Edmond Randolph's statements in James McHenry's Notes); *id.* at 24 (Edmond Randolph's statements in Yates's Notes). The second property proposed was the prevention of discord between the states and sedition within the states. *Id.* at 23-24. "What are the great objects of the [General] System? 1. defence [sic] ag[ainst] foreign invasion. 2. ag[ainst] internal sedition." 2 *id.* at 220 (quoting Rufus King on August 8, 1787). Of course, there were other reasons behind the Federal Constitutional Convention, such as trade wars between the states, impairment of contracts in aid of debtors, comity issues, full faith and credit issues, etc., which are beyond the scope of this Note.

66. U.S. Const. art. I, § 10, cl. 3.

67. U.S. Const. art. I, § 8, cl. 15.

68. U.S. Const. art. I, § 8, cl. 16.

69. U.S. Const. art. I, § 8, cls. 12, 13. The states were wary of the centralization of military power in the federal government, which is why there is a claw-back in Article I, Section 8, that provides that state militia officer appointments and training are done by the states. See U.S. Const. art. I, § 8, cl. 16. Furthermore, the Constitution requires application by the state legislature to Congress before there is federal intervention against "domestic Violence." U.S. Const. art. IV, § 4. This fear of concentrated military power in the hands of the federal government is also reflected in the Second Amendment, which denies the federal government a monopoly on arms. U.S. Const. amend. II.

70. U.S. Const. art. I, § 9, cl. 2. There is some question as to whether the framers were intending merely to limit congressional suspension of state habeas corpus, or if the Suspension Clause implies that there is a federal writ of habeas corpus. For an argument that the Suspension Clause was limited to state habeas corpus, and that no federal writ of habeas corpus was intended, see William F. Duker, *A Constitutional History of Habeas Corpus* 126-35 (1980). Whether or not a federal habeas corpus was intended, it was quickly provided for

legislative suspension and was to be limited in time.⁷¹ It was followed by provisions for the liberty of press, a ban on standing armies in peacetime without the consent of the legislature, subordination of the military power to civilian power, and a ban on the quartering of soldiers in private houses during peacetime without the consent of the owners.⁷² These provisions, some of which would reemerge in the Bill of Rights, were either implicitly inserted into the Constitution structurally⁷³ or dropped in the final version of the Constitution; the Suspension Clause, however, was left in.⁷⁴

On August 28, 1787, despite some concerns that habeas corpus should be inviolable,⁷⁵ and that any suspension should have a time limit,⁷⁶ the Suspension Clause emerged in essentially the same form as it appears in the Constitution, albeit placed in what would become Article III, which deals with the federal judiciary.⁷⁷ In contrast to what was debated at the Federal Convention, the final version of the Suspension Clause did not state that habeas corpus was inviolable, contained no explicit provision for legislative suspension (although the clause is placed within Article I, Section 9, which

in the Judiciary Act of 1789 and was firmly established early on in the Supreme Court's history. *See infra* Part I.E.1.

71. The first version of the Suspension Clause in The Records of the Federal Convention of 1787 reads, "The privileges and benefit of the writ of habeas corpus shall be enjoyed in this government in the most expeditious and ample manner: and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding ____ months." 2 Farrand, *supra* note 22, at 334, 341 (quoting the Journal and Madison's Notes from August 20, 1787).

72. *Id.* at 334-35; 3 *id.* at 122.

73. For instance, subordination of the military power to the civilian follows from the Commander in Chief being elected. *See* U.S. Const. art. II, §§ 1, 2.

74. This suggests that the framers were more concerned with the suspension of habeas corpus in order to deal with rebellions like Shays' than they were with textually guaranteeing habeas corpus as an affirmative procedural right. *But see* The Federalist No. 84 (Alexander Hamilton), *supra* note 2, at 479-80. Alexander Hamilton believed the Suspension Clause to establish federal habeas corpus:

The establishment of the writ of *habeas corpus*, the prohibition of *ex post facto* laws, and of TITLES OF NOBILITY, to which we have no corresponding provisions in our [New York] Constitution, are, perhaps, greater securities to liberty and republicanism than any it contains [T]he practice of arbitrary imprisonments, have been in all ages, the favorite and most formidable instruments of tyranny.

Id.

75. 2 Farrand, *supra* note 22, at 438 ("Mr. Rutledge was for declaring the Habeas Corpus inviolable—He did <not> conceive that a suspension could ever be necessary at the same time through all the States").

76. *Id.* ("Mr. Pinkney, urging the propriety of securing the benefit of the Habeas corpus in the most ample manner, moved 'that it should not be suspended but on the most urgent occasions, & then only for a limited time not exceeding twelve months.'").

77. *Id.* at 435 ("The privilege of the writ of Habeas Corpus shall not be 'suspended; unless where in cases of rebellion or invasion 'the public safety may require it.'" (quoting the Journal from August 28, 1787)). The initial placement of the Suspension Clause in what would become Article III suggests that the framers originally intended the judiciary to have the power to suspend habeas corpus.

deals with limitations upon congressional powers), and placed no time limit on any suspension.⁷⁸

On September 10, 1787, in a draft referred to the Committee of Style, the Suspension Clause was still in what would become Article III, after the guarantee of criminal jury trials.⁷⁹ By September 12, 1787, it was in its current place, Article I, Section 9, Clause 2.⁸⁰ In the form that the Suspension Clause appears in the Constitution, it is couched entirely in domestic terms, with suspension permissible only in cases of rebellion or invasion.⁸¹ No reference is made to the reach of the writ of habeas corpus beyond the borders of the United States, an issue that would not come up until the twentieth century.⁸²

78. U.S. Const. art. I, § 9, cl. 2.

79. 2 Farrand, *supra* note 22, at 576.

80. *Id.* at 596. The rest of the references to the Suspension Clause are found in Farrand's appendices. 3 *id.* at 122 ("The next Article provides for the privilege of the Writ of Habeas Corpus" (citation omitted) (quoting Charles Pinckney's pamphlet regarding the Federal Convention, printed sometime before October 14, 1787)); 3 *id.* at 149 ("Public Safety may require a suspension [sic] of the Ha[beas] Corpus in cases of necessity: when those cases do not exist, the virtuous Citizen will ever be protected in his opposition to power, 'till corruption shall have obliterated every sense of Honor & Virtue from a Brave and free People.'" (quoting James McHenry before the Maryland House of Delegates on November 29, 1787)); *id.* at 157 ("Nothing could add to the mischievous [sic] tendency of this system more than the power that is given to suspend the Act of Ha[beas] Corpus—Those who could not approve of it urged that the power over the Ha[beas] Corpus ought not to be under the influence of the General Government. It would give them a power over Citizens of particular States who should oppose their encroachments, and the inferior Jurisdictions of the respective States were fully competent to Judge on this important privilege [sic]; but the Almighty [sic] power of deciding by a call for the question, silenced all opposition to the measure as it too frequently did to many others." (quoting Luther Martin before the Maryland House of Representatives on November 29, 1787)); *id.* at 213 ("As the State governments have a power of suspending the *habeas corpus* act in [cases of rebellion or invasion], it was said, there could be no reason for giving such a power to the general government; since whenever the State which is invaded, or in which an insurrection takes place, finds its safety requires it, it will make use of that power. And it was urged, that if we gave this power to the general government, it would be an engine of oppression in its hands; since, whenever a State should oppose its views, however arbitrary and unconstitutional, and refuse submission to them, the general government may declare it to be *an act of rebellion*, and, suspending the *habeas corpus* act, may *seize* upon the person of those *advocates of freedom*, who have had *virtue* and *resolution* enough to excite the opposition, and may *imprison* them during its pleasure, in the *remotest* part of the Union; so that a citizen of Georgia might be *bastiled* in the furthest part of New Hampshire, or a citizen of New Hampshire in the furthest extreme to the south, cut off from their family, their friends, and their every connexion [sic]. These considerations induced me, Sir, to give my negative also to this clause." (quoting Luther Martin's pamphlet "Genuine Information," delivered to the Maryland Legislature on November 29, 1787)); *id.* at 290 ("It was my wish that the general government should not have the power of suspending the privilege of the writ of *habeas corpus*, as it appears to me altogether unnecessary, and that the power given to it may and will be used as a dangerous engine of oppression, but I could not succeed." (quoting Luther Martin in "Reply to a Landholder" on March 14, 1788).

81. U.S. Const. art. I, § 9, cl. 2.

82. *E.g.*, Johnson v. Eisentrager, 339 U.S. 763 (1950) (holding that German nationals convicted in China by a military commission had no right to habeas corpus).

D. A Brief Overview of the Suspension of Habeas Corpus in the United States

The Federal Government has only officially suspended habeas corpus twice in the history of the continental United States. President Abraham Lincoln suspended the writ, initially without congressional authorization, during the Civil War.⁸³ President Ulysses S. Grant suspended the writ, pursuant to congressional authorization, during Reconstruction.⁸⁴ The U.S. military has also ignored habeas corpus at least once, albeit during a situation of martial law during wartime.⁸⁵ The writ has been suspended twice in United States' territories, pursuant to congressional authorization: once by the territorial governor of the Philippines in 1905,⁸⁶ and once by the territorial governor of Hawaii during World War II.⁸⁷ All of these

83. *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487); William H. Rehnquist, *All The Laws But One: Civil Liberties in Wartime* 21-25 (1998).

84. See *infra* notes 164-65 and accompanying text.

85. During the War of 1812, then-General Andrew Jackson ignored a writ of habeas corpus during the period he imposed martial law in New Orleans. As soon as the war was over and he lifted martial law, he acknowledged the jurisdiction of the court issuing the writ (whose judge Jackson had run out of town for issuing the writ in the first place) by paying a \$1000 fine for contempt. Rehnquist, *supra* note 83, 68-70; see *Johnson v. Duncan*, 3 Mart. (o.s.) 530 (La. 1815); Duker, *supra* note 70, at 142, 172 n.128. President Andrew Johnson also suspended the writ of habeas corpus for one of the conspirators in Lincoln's assassination. Rehnquist, *supra* note 83, at 165.

86. *Fisher v. Baker*, 203 U.S. 174, 179-81 (1906) (discussing the Governor of the Philippines's suspension of habeas corpus because of "a state of insecurity and terrorism"). Between 1898 and 1902, the United States fought a bloody war against Philippine insurgents that required 200,000 American troops and resulted in the deaths of 4300 American soldiers. 2 Alan Brinkley, *American History: A Survey* 707-09 (10th ed. 1999). In 1898, the United States had acquired the Philippines from Spain for twenty million dollars as part of the Treaty of Paris, which ended the Spanish-American War. Zinn, *supra* note 63, at 312-13. Although the Philippine War is generally said to have ended in 1902, intermittent fighting continued until 1906. 2 Brinkley, *supra*, at 709. Congress had authorized the suspension of habeas corpus in the Philippines when "in cases of rebellion, insurrection, or invasion the public safety . . . require[d] it." *Fisher*, 203 U.S. at 179 (internal quotation omitted). The President, or the Philippine governor with approval of the Philippine Commission, was granted the power to suspend. *Id.* On January 31, 1905, the Governor of the Philippines, on recommendation of the Philippine Commission, suspended habeas corpus in the province of Batangas because of armed insurrection and a "state of insecurity and terrorism among the people." *Id.* The appellant, Barcelon, was arrested in Batangas, and challenged the detention by petitioning the Philippine Supreme Court for a writ of habeas corpus. *Id.* at 178. The court denied the petition because habeas corpus had been suspended. *Id.* at 178-79. Barcelon appealed to the United States Supreme Court. *Id.* at 179. The Court dismissed the habeas corpus petition as moot because the Governor of the Philippines had ended the suspension while the appeal was pending. *Id.* at 181.

87. *Duncan v. Kahanamoku*, 327 U.S. 304, 307-08 (1946) (discussing the Governor of Hawaii's suspension of habeas corpus after the Pearl Harbor attack). Under the Hawaiian Organic Act of 1900, the governor of Hawaii was granted the power to suspend habeas corpus when the "public safety" required it. *Id.* After the surprise attack on Pearl Harbor in December 1941, the governor suspended habeas corpus and declared martial law. *Id.* The two petitioners in *Duncan* were both convicted and sentenced to terms in prison by a military court. *Id.* at 309-11; Rehnquist, *supra* note 83, at 215-16. Both petitioned the District Court of Hawaii for writs of habeas corpus that were granted. *Duncan*, 327 U.S. at 307. The Ninth Circuit reversed. *Id.* The Supreme Court reversed the Ninth Circuit and, citing *Ex parte*

suspensions have case law surrounding them, and an examination of the most important Suspension Clause cases will ground the discussion in Part II of the jurisdictional and procedural issues involved with the Suspension Clause.

E. *The Suspension Clause in United States' Case Law*

The main jurisdictional question emerging from the Suspension Clause case line is whether the Suspension Clause is a constitutional grant of habeas corpus jurisdiction, making habeas corpus "inviolable," as John Rutledge argued it should be at the Federal Convention.⁸⁸ Opposed to this view is Chief Justice John Marshall's dictum in *Ex parte Bollman*, stating that there was a constitutional right to habeas corpus but that it required congressional authorization to be effectuated.⁸⁹

The main procedural question that emerges from the case law is whether suspension of habeas corpus suspends judicial review of executive detention, as expressed in Justice Scalia's *Hamdi v. Rumsfeld* dissent,⁹⁰ or if suspension only applies to the privilege of the writ and therefore there is at least some judicial review of an executive detention when habeas corpus has been suspended, as argued in *Ex parte Merryman*.⁹¹

Part I.E.1 focuses on the jurisdictional and procedural views of the Suspension Clause as it appears in the federal case line. Only cases that directly discuss the Suspension Clause are included in the main text; details on related cases can be found in the footnotes. Part I.E first focuses on Justice John Marshall's interpretation of the Suspension Clause and the constitutional jurisdictional status of habeas corpus in *Bollman*. Then, by way of contrast, the jurisdictional and procedural Suspension Clause views expressed in the Civil War cases of *Ex parte Merryman* and *Ex parte Milligan* are laid out, before consideration of the Reconstruction Cases of *Ex parte McCardle* and *Ex parte Yerger*.⁹² This Note skips President Ulysses S. Grant's suspension of habeas corpus in South Carolina pursuant to congressional statute during Reconstruction and two suspensions in United States territories as unimportant. Part I.E.4 jumps ahead to 2001 and

Milligan, struck down the petitioners' convictions by military tribunal and reaffirmed their constitutional rights to a jury trial. *Id.* at 326. ("Tested by the *Milligan* rule, the military proceedings in issue plainly lacked constitutional sanction."); *id.* at 332 (Murphy, J., concurring) ("Constitutional rights are rooted deeper than the wishes and desires of the military."). The Court in *Duncan* did not reach the question of the constitutionality of the suspension of habeas corpus by the Governor of Hawaii, because by the time the issue reached the Court, the suspension had been lifted and the issue was moot. *Id.* at 312 n.5.

88. 2 Farrand, *supra* note 22, at 438 ("Mr. Rutledge was for declaring the Habeas Corpus inviolable—He did <not> conceive that a suspension could ever be necessary at the same time through all the States . . .").

89. 8 U.S. (4 Cranch) 75, 95 (1807); *see infra* Part I.E.1.

90. 124 S. Ct. 2633, 2665-66 (2004) (Scalia, J., dissenting) ("When the writ is suspended, the Government is entirely free from judicial oversight.").

91. *Ex parte Merryman*, 17 F. Cas. 144, 147-48 (C.C.D. Md. 1861) (No. 9487).

92. *See infra* Part I.E.2-3.

INS v. St. Cyr.⁹³ Finally, Part I.E.5 examines the Suspension Clause issues involved in the recent War on Terror cases of *Rumsfeld v. Padilla*,⁹⁴ *Rasul v. Bush*,⁹⁵ and *Hamdi v. Rumsfeld*.⁹⁶

1. The Antebellum Period: *Ex Parte Bollman*

In 1795, in *United States v. Hamilton*, the United States Supreme Court first issued a writ of habeas corpus with no explanation of its jurisdiction to do so.⁹⁷ In 1806 the Court's habeas corpus jurisdiction came into question in *Ex parte Burford*, but Chief Justice John Marshall issued the writ on the authority of *Hamilton*, while noting that there were some jurisdictional questions as to the Court's authority to issue a writ of habeas corpus.⁹⁸ Finally, in 1807, in *Ex parte Bollman*,⁹⁹ Marshall resolved the Court's jurisdiction in favor of allowing it to issue writs of habeas corpus.

Bollman definitively established the foundation for the Supreme Court's habeas corpus jurisdiction and eliminated the jurisdictional questions left unanswered by *Hamilton* and *Burford*.¹⁰⁰ Chief Justice Marshall stated that, although habeas corpus is a constitutional right under the Suspension Clause, this right is not self-executing and instead requires a congressional statute to effectuate it.¹⁰¹ *Bollman* is also important because it established the Court's appellate jurisdiction over habeas corpus petitions filed originally with the Court.¹⁰²

In 1807, President Thomas Jefferson unsuccessfully appealed to Congress to suspend habeas corpus after Burr's Conspiracy.¹⁰³ Eric Bollman and Samuel Swartwout had been arrested by the military in New Orleans for their participation in the Burr Conspiracy and were transported to Washington, D.C.¹⁰⁴ The administration, fearing that the conspirators would be released on a writ of habeas corpus, convinced the Senate to sit in a closed session and pass a bill to suspend habeas corpus.¹⁰⁵ The Senate referred the bill to the House, requesting that the House consider it in secret

93. 533 U.S. 289 (2001); see *infra* Part I.E.4.

94. 124 S. Ct. 2711 (2004); see *infra* Part I.E.5.a.

95. 124 S. Ct. 2686 (2004); see *infra* Part I.E.5.b.

96. 124 S. Ct. 2633 (2004); see *infra* Part I.E.5.c.

97. See *United States v. Hamilton*, 3 U.S. (3 Dall.) 17 (1795).

98. 7 U.S. (3 Cranch) 448, 449 (1806).

99. *Ex parte Burford*, 8 U.S. (4 Cranch) 75 (1807).

100. Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 Sup. Ct. Rev. 153, 162.

101. *Ex parte Bollman*, 8 U.S. (4 Cranch) at 95.

102. Oaks, *supra* note 100, at 161-62.

103. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2665 (2004) (Scalia, J., dissenting) (citing 16 Annals of Congress 402-25 (1807)). In 1806, Aaron Burr was arrested and put on trial for treason for allegedly seeking "to separate the Southwest from the United States and create a western empire that Burr would rule." 1 Brinkley, *supra* note 86, at 247-48. Burr was acquitted. *Id.*

104. Oaks, *supra* note 100, at 160.

105. Duker, *supra* note 70, at 135-36.

session.¹⁰⁶ The House refused, and rejected the bill in open session by a vote of 113-19.¹⁰⁷

By the end of January 1807, Bollman and Swartwout were out of military custody, but were quickly imprisoned by the D.C. Circuit Court on charges of treason.¹⁰⁸ Bollman and Swartwout then petitioned the Supreme Court for writs of habeas corpus.¹⁰⁹ The issue of the basis of the Court's habeas corpus jurisdiction, which had been evaded in *Hamilton* and *Burford*, came to the fore in *Bollman*. For Chief Justice Marshall, jurisdiction turned on the proper way to interpret section 14 of the Judiciary Act of 1789.¹¹⁰

First, it was unclear whether section 14 of the Judiciary Act of 1789 gave the Supreme Court the power to issue writs of *habeas corpus ad subjiciendum*, despite the Court's previous issuance of such writs, because the second sentence of section 14 seemed to limit jurisdiction only to what was "necessary" for a court's jurisdiction.¹¹¹ It was problematic to say that issuance of a writ of habeas corpus was "necessary" to the Court's jurisdiction because, at the time of *Bollman*, Congress had not authorized criminal appellate review by the Supreme Court, and issuing a writ of

106. *Id.* at 137.

107. *Id.*

108. *Id.*

109. Oaks, *supra* note 100, at 161. For the factual background of the case, and an account of the considerable excitement it caused in Washington, D.C. (to the point that "the Senate could scarcely form a quorum, and the House actually adjourned" to watch the case), see *id.* at 160; Duker, *supra* note 70, at 135-37.

110. Section 14 reads,

And be it further enacted, That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, . . . and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case extend to prisoner in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

Judiciary Act of 1789, ch. 20, 1 Stat. 73, 81-82 (codified as amended at 28 U.S.C. §§ 2242-2256 (2000)). A writ of *scire facias* is "[a] writ requiring the person against whom it is issued to appear and show causes why some matter of record should not be annulled or vacated, or why a dormant judgment against that person should not be revived." Black's Law Dictionary, *supra* note 6, at 1347.

111. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 89, 94-95 (1807). Dallin Oaks has described the issue in regards to section 14 as follows:

The problem stemmed from the fact that the second sentence of section 14 (which specifically authorized a use of the writ to inquire into the cause of commitment) conferred no authority on the Supreme Court (or any other court), whereas the first sentence has a qualifying clause that seemed to limit the authority of a court to issue the writ to circumstances where it was "necessary for the exercise of their respective jurisdictions."

Oaks, *supra* note 100, at 174.

habeas corpus could be construed as appellate review of a criminal matter decided in a lower court.¹¹²

Second, if Congress was granting jurisdiction to the Supreme Court under section 14 to issue writs of *habeas corpus ad subjiciendum*, this could be read as a grant of original jurisdiction that violated the holding of *Marbury v. Madison*,¹¹³ which limited the Court's original jurisdiction to what was enumerated in Article III.¹¹⁴

Thus, the Court was in a bit of a quandary. If the Judiciary Act of 1789 only authorized courts to issue habeas corpus writs on matters that were necessary to their jurisdiction,¹¹⁵ then no habeas corpus writ could issue from the Supreme Court, and *Hamilton* and *Burford* were bad law because the Supreme Court did not have criminal appellate jurisdiction.¹¹⁶ If the Court was exercising original jurisdiction, then it would be doing so in violation of the holding of *Marbury*.

The Court held, three to one (two Justices were out sick),¹¹⁷ with Chief Justice Marshall writing the majority opinion, that the writ could be issued.¹¹⁸ Jurisdiction to issue the writ was implied when section 14 was read alongside section 33.¹¹⁹ Section 33 gave the Court the power to grant bail in capital cases.¹²⁰ Bail was traditionally granted through the writ of habeas corpus, and thus section 33 was a congressional grant of habeas corpus jurisdiction to the Court, which implied that Congress had intended the Court to have the power under section 14 as well.¹²¹

The issuance of a writ of habeas corpus was an exercise of appellate, and not original, jurisdiction, even though the petition was originally addressed

112. Bollman and Swartwout were imprisoned on the authority of a lower court with the power to provide for bail, and thus habeas review was seemingly appellate review of a lower court's decision on a criminal matter. See *Ex parte Bollman*, 8 U.S. (4 Cranch) at 100.

113. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1802).

114. See *Ex parte Bollman*, 8 U.S. (4 Cranch) at 100-01.

115. See *supra* note 109-10 and accompanying text.

116. This is why counsel for one of the petitioners argued that the Supreme Court had appellate jurisdiction over criminal cases as a matter of constitutional right. *Ex parte Bollman*, 8 U.S. (4 Cranch) at 77.

117. *Id.*

118. On February 13, 1807, the Court issued the writ of habeas corpus. *Id.* at 101. On February 16 came the return. *Id.* at 108. Arguments regarding the sufficiency of the evidence justifying the commitment were argued until February 21. *Id.* at 108-24. On February 21, Chief Justice Marshall, speaking for the Court, held that the commitment of the petitioners was not justified by the proffered evidence, which consisted mainly of affidavits and depositions attesting to the wrongful acts of the petitioners. *Id.* at 125-37.

119. Marshall explained this reading as follows:

The appropriate process of bringing up a prisoner, not committed by the court itself, to be bailed, is by [*habeas corpus ad subjiciendum*]. Of consequence, a court possessing the power to bail prisoners, not committed by itself, may award a writ of *habeas corpus* for the exercise of that power. [Section 33 of the Judiciary Act of 1789] obviously proceeds on the supposition that this power was previously given, and is explanatory of the 14th section.

Id. at 100.

120. *Id.* at 99-100.

121. *Id.*

to the Supreme Court.¹²² The Court was not engaging in criminal appellate review because this was a collateral matter:

It has been demonstrated at the bar, that the question brought forward on a *habeas corpus*, is always distinct from that which is involved in the cause itself. The question whether the individual shall be imprisoned, is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore, these questions are separated, and may be decided in different courts.¹²³

Chief Justice Marshall reconciled his holding that congressional authorization was required before the Supreme Court could issue writs of habeas corpus with the fact that the Suspension Clause designates the writ as a constitutional privilege by arguing that, although the Suspension Clause presumes the existence of the writ, the privilege of the writ was not self-executing:

[Congress] must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give, to all the courts, the power of awarding writs of *habeas corpus*.¹²⁴

Further mentioning the Suspension Clause in dictum, Marshall commented that any decision regarding suspension was a purely political one for the legislature to decide.¹²⁵

Bollman has been criticized as wrongly decided because of the holding's dependency upon statutorily granted habeas corpus jurisdiction, rather than constitutionally conferred jurisdiction.¹²⁶ The Civil War cases of *Ex parte Merryman* and *Ex parte Milligan* express a different view of the Suspension Clause from that expressed in *Bollman*.

2. The Civil War

In 1861, on the eve of the Civil War, confederate sympathizers burned railroad bridges in and around Baltimore. The bridges were critical to

122. The Court held that "that which the court is now asked to exercise is clearly appellate. It is the revision of a decision of an inferior court, by which a citizen has been committed to jail." *Id.* at 101. This reasoning leads to the position that "[t]he so-called 'original writ of habeas corpus' is not 'original' in the sense that it issues in the exercise of the Court's original jurisdiction." Oaks, *supra* note 100, at 155 (citations omitted).

123. *Ex parte Bollman*, 8 U.S. (4 Cranch) at 101.

124. *Id.* at 95. Marshall considered it a given that the common law did not grant federal courts such jurisdiction because "courts which are created by written law . . . cannot transcend that jurisdiction." *Id.* at 93. He believed it unnecessary to state his reasoning because it was contained in numerous preceding decisions of the Court, none of which he cited. *Id.*

125. *Id.* at 101. ("If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so.").

126. Mian, *supra* note 28, at 190-93.

transporting state militias into Washington, D.C., to protect the capitol from a feared confederate invasion.¹²⁷ President Lincoln, in response and with Congress not in session,¹²⁸ did not hesitate to suspend habeas corpus without congressional authorization.¹²⁹ This raised an immediate question as to whether the President could constitutionally do so.

a. Ex Parte Merryman

On May 25, 1861, at around two in the morning, John Merryman was roused from his bed in Baltimore County by federal soldiers and imprisoned in nearby Fort McHenry.¹³⁰ No warrant was presented, and no specific charges were made against Merryman beyond “general charges of treason and rebellion, without proof, and without giving the names of the witnesses, or specifying the acts which, in the judgment of the military officer, constituted these crimes.”¹³¹ Merryman was allowed access to counsel, and his counsel filed a petition for habeas corpus the same day in the Federal Circuit Court for the District of Maryland.¹³² Chief Justice Roger Taney, sitting as a Supreme Court Justice (and not as a Circuit Court judge) issued the writ, directed to General George Cadwalder (the commander at Fort McHenry), on May 26, with a return date of May 27.¹³³ On the return date, Colonel Lee came and informed the court that Merryman would not be produced because he was being held for “various acts of treason,” among other things, and that the President had suspended habeas corpus.¹³⁴ An order of attachment for contempt issued by Taney against General Cadwalder was ignored.¹³⁵

Chief Justice Taney began his decision by stating his surprise that the President claimed the power to suspend habeas corpus.¹³⁶ Taney noted that there had been no public notice of the suspension by the President, and that Thomas Jefferson never claimed the President had the power to suspend habeas corpus when Jefferson sought to suspend it during the Burr Conspiracy.¹³⁷ Taney analyzed the Suspension Clause and determined that, because of its placement in Article I, only the legislature could suspend

127. Rehnquist, *supra* note 83, at 21-25.

128. See The Green Papers, Footnotes for the Sessions of the 37th Congress, 1861-1863, <http://www.thegreenpapers.com/soc/note.phtml?congress=37> (last visited Oct. 21, 2005).

129. President Lincoln authorized General Scott to suspend habeas corpus on April 27, 1861. Rehnquist, *supra* note 83, at 25.

130. *Ex parte Merryman*, 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (No. 9487). Note that, although this case is in a federal case reporter, it is not an instance of a Supreme Court justice “riding circuit.” Rather, the case involves a direct application for a writ of habeas corpus to Supreme Court Justice Roger Taney. *Id.* at 145.

131. *Id.* at 147.

132. *Id.* at 145.

133. *Id.* at 146.

134. *Id.*

135. *Id.* at 146-47.

136. *Id.* at 148.

137. *Id.* For a discussion of the Burr Conspiracy, see *supra* note 103 and accompanying text.

habeas corpus.¹³⁸ Taney further noted that, if the framers had intended the President to be able to suspend habeas corpus, they would have indicated as much in Article II, which has no such provision.¹³⁹ By suspending habeas corpus, the President violated Article II, Section 3, which requires the President to faithfully execute the laws: "He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law."¹⁴⁰

After launching into a history of habeas corpus and citing *Bollman* for the proposition that only the legislature can suspend habeas corpus,¹⁴¹ Taney concluded that not only had Lincoln suspended habeas corpus, but that Lincoln had suspended due process, something Congress itself was not empowered to do:

These great and fundamental laws, which congress itself could not suspend, have been disregarded and suspended, like the writ of habeas corpus, by a military order, supported by force of arms. Such is the case now before me, and I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.¹⁴²

Lincoln never acknowledged Taney's decision, but transferred jurisdiction of Merryman's case to the civilian courts, where a grand jury indicted him for conspiracy to commit treason; he was released on bail and never tried.¹⁴³

In August 1861, Congress retroactively approved Lincoln's suspension of habeas corpus.¹⁴⁴ Lincoln continued to make unauthorized declarations of suspension after this.¹⁴⁵ On March 3, 1863, Congress granted discretionary power, with some limitations providing for a modicum of judicial review, to President Lincoln to suspend habeas corpus.¹⁴⁶

Merryman involved a military imprisonment, unlike *Bollman*,¹⁴⁷ but Taney asserted jurisdiction over the United States military nonetheless,

138. *Ex parte Merryman*, 17 F. Cas. at 148.

139. *Id.* at 148-49.

140. *Id.* at 149.

141. *Id.* at 150-52.

142. *Id.* at 152.

143. Walter F. Murphy et al., *American Constitutional Interpretation* 1537 (3d ed. 2003).

144. *Id.* at 1541.

145. See Proclamation No. 1., 13 Stat. 730 (1862).

146. Lists of those detained had to be provided to the local federal district court, and if a grand jury failed to indict, the court could order a detainee's release. An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, ch. 81, 12 Stat. 755 (1863) (repealed 1873).

147. See *supra* Part I.E.

because for him suspending habeas corpus did not necessarily entail suspending due process. A similar argument is found in *Milligan*.¹⁴⁸

b. Ex Parte Milligan

On October 5, 1864, Lambdin P. Milligan was arrested at his home in Indiana by the order of General Alvin P. Hovey, because of Milligan's alleged involvement with the Sons of Liberty, an organization of northern Confederate sympathizers.¹⁴⁹ The Sons of Liberty were allegedly plotting to free the roughly 8000 confederate prisoners held at Camp Douglas, near Chicago, in August 1864.¹⁵⁰ Arms were allegedly obtained towards this end.¹⁵¹

On October 21, 1864, Milligan was tried in front of a military commission,¹⁵² found guilty, and sentenced to be hanged.¹⁵³ On January 2, 1865, a grand jury was empanelled by the Circuit Court of the United States for Indiana and failed to return an indictment against Milligan.¹⁵⁴

This failure to indict became the basis for Milligan's habeas corpus appeal to the United States Supreme Court. Under the Habeas Corpus Suspension Act of 1863, anyone subject to executive detention, in places where the federal courts were operating, against whom a grand jury failed to return an indictment, was subject to discharge by the court.¹⁵⁵ Because

148. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). Clinton Rossiter has criticized *Ex parte Milligan* as overrated:

As a restraint upon a President beset by martial crisis it was then, and in 1950, of practically no value whatsoever. It cannot be emphasized too strongly that the decision in this case followed the close of the rebellion by a full year, altered not in the slightest degree the extraordinary methods through which that rebellion had been suppressed, and did nothing more than deliver from jail a handful of rascals who in any event would have probably gained their freedom in short order. For [Andrew] Johnson it was, if anything, an extra round of ammunition to be fired at Thad Stevens. And upon all Presidents who have come after, it has had precious little demonstrable effect. True, it has been urged upon the Court many times in the hope of restraining some unusual presidential or congressional action, but never yet has it gained an important victory. No justice has ever altered his opinion in a case of liberty against authority because counsel for liberty recited *Ex Parte Milligan*.

Rossiter, *supra* note 4, at 34-35. *But see* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2643, 2647 (2004) (O'Connor, J., plurality opinion) (citing *Ex parte Milligan*); *id.* at 2667-70 (Scalia, J., dissenting) (citing *Ex parte Milligan*); *id.* at 2682 (Thomas, J., dissenting) (citing *Ex parte Milligan*); Rasul v. Bush, 124 S. Ct. 2686, 2693 (2004) (Stevens, J.) (citing *Ex parte Milligan*); *id.* at 2700 (Kennedy, J., concurring) (citing *Ex parte Milligan*).

149. *Ex parte Milligan*, 71 U.S. (4 Wall.) at 107-08; Rehnquist, *supra* note 83, at 83.

150. Rehnquist, *supra* note 83, at 83.

151. *Id.*

152. The charges against Milligan included conspiracy against the government, insurrection, and violation of the laws of war. *See Ex parte Milligan*, 71 U.S. (4 Wall.) at 106-07, for the full list.

153. *Id.* at 107.

154. *Id.* at 107-08.

155. *Id.* at 133; *see* An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, ch. 81, 12 Stat. 755, § 2 (1863) (repealed 1873).

the federal courts were open, and Congress had not authorized the trial by military commission (according to the Court) that Milligan was subjected to, Milligan's petition for a writ of habeas corpus was granted.¹⁵⁶ The Court issued the writ even though it appeared that habeas corpus had been suspended by Congress.

The Court justified this decision by reference to how the Suspension Clause functions: "The suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it."¹⁵⁷ This interpretation of how the Suspension Clause functions, unlike Justice Scalia's interpretation in *Hamdi*, which argues that suspension of habeas corpus suspends judicial review,¹⁵⁸ is how the writ functioned under the common law.¹⁵⁹

The Suspension Clause states that the "Privilege of the Writ of Habeas Corpus shall not be suspended."¹⁶⁰ The privilege of the writ can be construed as separate from the writ itself; the privilege may be viewed as the ends ("discharge, bail, or a speedy trial") and the writ itself as merely the means towards this end.¹⁶¹ Thus, for the *Milligan* Court, a court may still issue a writ of habeas corpus when Congress has suspended the writ, and on return of the writ the court can determine whether the petitioner was in the class for whom the privilege of the writ was suspended, essentially ruling on the constitutionality of suspension itself, at least in reference to the particular detainee.

Milligan, along with *Merryman*, holds that judicial review of an executive detention is not suspended when the privilege of the writ is suspended, because the writ itself may still issue and on the return (or lack thereof, as was the case in *Merryman*), the court may evaluate the validity and applicability of the suspension.¹⁶² Chief Justice Marshall in *Bollman*, held the opposing view, stating that federal habeas corpus jurisdiction was dependent on congressional authorization, despite being guaranteed by the Suspension Clause.¹⁶³ During Reconstruction, Congress and the Supreme Court clashed over this issue, most notably in *Ex parte McCardle* and *Ex parte Yerger*, decisions which came out on both sides of the question.

156. *Ex parte Milligan*, 71 U.S. (4 Wall.) at 133-35.

157. *Id.* at 130-31.

158. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2665-66 (2004) (Scalia, J., dissenting).

159. See *supra* Part I.A.

160. U.S. Const. art. I, § 9, cl. 2.

161. Duker, *supra* note 70, at 171 n.121 ("The operation and effect of suspension in the United States is similar to that in England.").

162. See *Ex parte Milligan*, 71 U.S. (4 Wall.) at 130-31 (stating that suspension does not preclude judicial review); *Ex parte Merryman*, 17 F. Cas. 144, 152 (C.C.D. Md. 1861) (No. 9487) (stating that Congress may not suspend due process in suspending habeas corpus).

163. *Ex parte Bollman*, 8 U.S. (4 Cranch) 74 (1807). See *supra* Part E.1 for a discussion of *Ex parte Bollman*.

3. Reconstruction

Reconstruction, the period between 1863 and 1877, was a turbulent and violent period in American history.¹⁶⁴ The Klu Klux Klan terrorized southern blacks, forcing President Grant at one point to suspend habeas corpus in South Carolina, pursuant to congressional authorization.¹⁶⁵ The post-war period started with President Andrew Johnson's conciliatory attitude to the now subjected former Confederate states, but then power quickly shifted into the hands of the Radical Republican-controlled Congress, which impeached Johnson but failed to convict him,¹⁶⁶ and which imposed strict conditions upon the former Confederate states for reentry into the Union.¹⁶⁷ The Radical Republicans would brook no challenge to their control of Reconstruction policy, and when a habeas corpus case emerged that brought the constitutionality of their Reconstruction policies into question, Congress quickly stripped the Court of jurisdiction to hear the case. That case was *Ex parte McCardle*.¹⁶⁸

a. Ex Parte McCardle

In 1867, Vicksburg, Mississippi newspaper editor William McCardle was arrested by the United States military and charged with "publication of

164. See generally 2 Brinkley, *supra* note 86, at 507-52; Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (1988).

165. Foner, *supra* note 164, at 457-58 ("Grant in October 1871 proclaimed a 'condition of lawlessness' in nine [South Carolina] upcountry counties and suspended the writ of habeas corpus."); see also *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2665 (2004) (Scalia, J., dissenting) (discussing Grant's suspension of habeas corpus in South Carolina). Congress authorized the suspension in the Klu Klux Klan Act of 1871. An Act to Enforce Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, § 4, 17 Stat. 14-15. The act "pushed Republicans to the outer limits of constitutional change" but was instrumental in breaking the back of the Klu Klux Klan in the south. Foner, *supra* note 164, at 455, 454-59. Part of the act granted discretion to the President to suspend habeas corpus in the face of southern insurrection, although a sunset provision was included in the act that caused it to expire after the next regular session of Congress. 17 Stat. 15, § 4. On October 17, 1871, President Grant declared a "condition of lawlessness" in nine South Carolina counties, suspended habeas corpus, and occupied the region with federal troops. Duker, *supra* note 70, at 178 n.190; Foner, *supra* note 164, at 457-58. The troops made hundreds of arrests, and perhaps 2,000 Klansmen fled the state. Personally directing the government's legal strategy, the Attorney General allowed those who confessed and identified the organization's leaders to escape without punishment, while bringing a few dozen of the worst offenders to trial before predominantly black juries. Most of those indicted eventually pleaded guilty and received prison sentences.

Id. at 458 (citation omitted). This was the last time that habeas corpus was officially suspended in the continental United States.

166. William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* 217-35 (1992).

167. For instance, ratification of the Fourteenth Amendment was a condition of reentry to the Union for the former confederate states. An Act to Provide for the More Efficient Government of the Rebel States (Reconstruction Act), ch. 153, 14 Stat. 428 (1867).

168. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868).

articles alleged to be incendiary and libelous.”¹⁶⁹ A military commission under the authority of the Reconstruction Act of 1867¹⁷⁰ tried McCardle.¹⁷¹ Utilizing the recently passed Habeas Corpus Act of 1867,¹⁷² McCardle filed a petition for a writ of habeas corpus with the federal Circuit Court for the Southern District of Mississippi, challenging his trial by military commission on the basis of the holding in *Ex parte Milligan*¹⁷³ and arguing that the Reconstruction Act was unconstitutional under *Milligan*.¹⁷⁴ The circuit court rejected his petition.¹⁷⁵

McCardle, again utilizing the Habeas Corpus Act of 1867, filed an appeal with the United States Supreme Court.¹⁷⁶ The Habeas Corpus Act of 1867 had modified the Supreme Court’s habeas corpus jurisdiction by granting the Court the right to review final habeas corpus judgments of the lower circuit courts.¹⁷⁷ The Court heard arguments in the Spring Term of 1868, but before it could render a decision, Congress, fearful that the Court would rule the Reconstruction Act unconstitutional, stripped the Court of its habeas corpus jurisdiction under section 3 of the Habeas Corpus Act of 1867.¹⁷⁸ The Court, knowing the repeal was coming, held the decision over until the next term.¹⁷⁹

The ostensible issue in *McCardle* was whether Congress’s repeal¹⁸⁰ of section 3 of the Habeas Corpus Act of 1867¹⁸¹ stripped the Supreme Court of jurisdiction to hear McCardle’s habeas corpus petition.¹⁸² The Court held that it did.¹⁸³ The real issue was whether the Court was going to question the constitutionality of the Reconstruction Act under which McCardle was imprisoned.¹⁸⁴ It did not.¹⁸⁵ The Radical Republican Congress was at the height of its power at this point, and one of the reasons given for delaying the decision from the previous Term was because Chief

169. *Id.* at 508; Donald G. Nieman, *Ex Parte McCardle*, in *The Oxford Guide to United States Supreme Court Decisions 180-81* (Kermit L. Hall ed., 1999).

170. Act of Mar. 2, 1867, ch. 153, 14 Stat. 428, § 3.

171. Nieman, *supra* note 169, at 180.

172. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385, *repealed by* Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44. The act allowed for habeas corpus petitions to be filed in federal circuit courts when a constitutional violation of a petitioner’s rights was alleged.

173. 71 U.S. (4 Wall.) 2 (1866). For a discussion of *Ex parte Milligan*, see *supra* Part I.E.2.b.

174. Nieman, *supra* note 169, at 180.

175. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 508 (1868).

176. *Id.*

177. The exact meaning of the Habeas Corpus Act of 1867, and the legislative intent behind it, is murky. See Duker, *supra* note 70, at 189-94.

178. Act of Mar. 27, 1868, ch. 34, 15 Stat. 44 (current version at 28 U.S.C. § 2254 (2000)); Nieman, *supra* note 169, at 180.

179. Nieman, *supra* note 169, at 180.

180. Act of Mar. 27, 1868, ch. 34, 15 Stat. 44 (current version at 28 U.S.C. § 2254 (2000)).

181. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (repealed 1868).

182. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 512 (1868).

183. *Id.* at 514.

184. See Nieman, *supra* note 169, at 180-81.

185. See *Ex parte McCardle*, 74 U.S. (7 Wall.) at 514.

Justice Chase was presiding over the impeachment of President Andrew Johnson.¹⁸⁶ Johnson had vetoed the Reconstruction Act, a veto that was quickly overridden by the Radical Republican Congress.¹⁸⁷

The Court made one caveat in its holding:

[Appellant] [c]ounsel seem[s] to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.¹⁸⁸

What was this previous jurisdiction? It was the jurisdiction previously exercised by the Court in cases like *Bollman*¹⁸⁹ and *Milligan*.¹⁹⁰ Yet there was no analysis in *McCardle* of whether jurisdiction would be proper under these cases. Nor was there any discussion of the Court's previous cases regarding habeas corpus jurisdiction. Thus, some claim that *McCardle* is more of a political decision than a constitutional one.¹⁹¹ Others assert that *McCardle* stands for unlimited congressional authority to strip the Supreme Court of appellate jurisdiction.¹⁹²

Bollman, *Burford*, and *Hamilton*, however, were all mentioned in the companion case to *McCardle*, a case that arguably limits *McCardle* to its facts and makes an argument for the Suspension Clause serving as a constitutional guarantee of the writ of habeas corpus.¹⁹³ That case is *Ex parte Yerger*.¹⁹⁴

b. Ex Parte Yerger

In 1867, Yerger was arrested by the United States military in Mississippi and tried by a military commission for the murder of "Joseph G. Crane, an army officer assigned to act as mayor for the city of Jackson, Mississippi."¹⁹⁵ Yerger petitioned the Circuit Court for the Southern District of Mississippi for a writ of habeas corpus, and the writ was issued, but upon the return the court held the imprisonment lawful and returned Yerger to military custody.¹⁹⁶ Yerger then petitioned the United States Supreme Court for a writ of certiorari and a writ of habeas corpus.¹⁹⁷ The

186. *Id.* at 509.

187. Rehnquist, *supra* note 166, at 209.

188. *Ex parte McCardle*, 74 U.S. (7 Wall.) at 515.

189. *Ex parte Bollman*, 8 U.S. (4 Cranch) 74 (1807); *see supra* Part E.1.

190. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *see supra* Part I.E.2.b.

191. *See* Nieman, *supra* note 169, at 180-81.

192. *See id.* at 181.

193. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 97-98 (1868). For the argument that the Suspension Clause is a constitutional guarantee of the writ of habeas corpus, *see id.* at 95-96.

194. *Id.*

195. Duker, *supra* note 70, at 196; *see also Ex parte Yerger*, 75 U.S. (8 Wall.) at 88.

196. *Ex parte Yerger*, 75 U.S. (8 Wall.) at 87-88.

197. *Id.* at 88.

main issue in *Yerger* was whether the Court had jurisdiction to issue a writ of habeas corpus,¹⁹⁸ given Congress's repeal of part of the Court's habeas corpus jurisdiction under the Act of March 27, 1868.¹⁹⁹ Although the issue was virtually the same as that in *McCardle*,²⁰⁰ the Court held that there was jurisdiction.²⁰¹

The Court began its discussion of its habeas corpus jurisdiction by briefly noting the English common law history of the writ, before noting that the writ of habeas corpus "found prominent sanction in the Constitution" in the Suspension Clause.²⁰² The Court further noted that "[t]he terms of [the Suspension Clause] necessarily imply judicial action. In England, all the higher courts were open to applicants for the writ, and it is hardly supposable that, under the [United States] government, founded on more liberal ideas and principles, any court would be, intentionally, closed to them."²⁰³ Furthermore, the *Yerger* Court stated that, whenever habeas corpus jurisdiction is being considered, the framers' intent as to habeas corpus must be kept in mind: "It is that every citizen may be protected by judicial action from unlawful imprisonment."²⁰⁴

The Court then surveyed the congressional grant of habeas corpus jurisdiction under section 14 of the Judiciary Act of 1789,²⁰⁵ along with the case line of *Hamilton*, *Burford*, and *Bollman*,²⁰⁶ and all the congressional habeas corpus statutes up until the statutory repeal of March 1867, the repeal in question in *McCardle* and *Yerger*.²⁰⁷ The Court concluded that

198. *Id.* at 94 ("The argument, by the direction of the court, was confined to the single point of the jurisdiction of the court to issue the writ prayed for.").

199. Act of Mar. 27, 1868, ch. 34, 15 Stat. 44 (current version at 28 U.S.C. § 2254 (2000)).

200. *See supra* Part I.E.3.a.

201. *Ex parte Yerger*, 75 U.S. (8 Wall.) at 106 ("The jurisdiction of the court to issue the writ prayed for is affirmed.").

202. *Id.* at 95-96.

203. *Id.*

204. *Id.* at 101.

205. Judiciary Act of 1789, ch. 20, 1 Stat. 73, § 14 (codified as amended at 28 U.S.C. §§ 2241-2255 (2000)).

206. *See supra* Part I.E.1.

207. An examination of these habeas corpus statutes is beyond the scope of this Note. The *Yerger* Court gave a good summary:

[Habeas corpus jurisdiction] [a]s limited by the act of 1789 . . . did not extend to cases of imprisonment after conviction, under sentences of competent tribunals; nor to prisoners in jail, unless in custody under or by color of the authority of the United States, or committed for trial before some court of the United States, or required to be brought into court to testify. But this limitation has been gradually narrowed, and the benefits of the writ have been extended, first in 1833 [4 Stat. 634], to prisoners confined under any authority, whether State or National, for any act done or omitted in pursuance of a law of the United States, or of any order, process, or decree of any judge or court of the United States; then in 1842 [5 Stat. 539] to prisoners being subjects or citizens of foreign States, in custody under National or State authority for acts done or omitted by or under color of foreign authority, and alleged to be valid under the law of nations; and finally, in 1867, to all cases where any person may be restrained of liberty in violation of the Constitution, or of any treaty or law of the United States.

the effect of the statutory repeal of March 1867 was solely limited to the Habeas Corpus Act of 1867, and did not affect the habeas corpus jurisdiction of the Court that existed prior to that act.²⁰⁸ That previous jurisdiction, the Court held, gave it habeas corpus jurisdiction over Yerger.²⁰⁹ This was a different situation than *McCardle*, because *McCardle* had sought a writ of habeas corpus under the Habeas Corpus Act of 1867, not under the jurisdictional principles asserted in *Yerger*.²¹⁰

Congress was not pleased with this holding, because it potentially put the constitutionality of the Reconstruction Act into play again.²¹¹ Because Yerger's case was not pressed further, and because of the slow end of the Reconstruction program, further congressional efforts to curtail the Court's habeas corpus jurisdiction failed.²¹² *Ex parte Yerger* is the last important habeas corpus case in relation to the Suspension Clause of the nineteenth century, and it stands in contrast to the view that *Ex parte McCardle* gives Congress carte blanche power to strip the Court of jurisdiction.²¹³

4. The Suspension Clause at the End of the Twentieth Century: *INS v. St. Cyr*

In June 2001, the Supreme Court held in *INS v. St. Cyr* that the Suspension Clause acted as a minimal guarantor of habeas corpus.²¹⁴ At issue in *St. Cyr* was whether amendments to the Immigration and Nationality Act²¹⁵ promulgated in the Antiterrorism and Effective Death Penalty Act of 1996²¹⁶ ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996²¹⁷ precluded the respondent from petitioning for a writ of habeas corpus as a way to challenge his deportation.²¹⁸

The Immigration and Naturalization Service ("INS") argued that the statutory amendments precluded the Court from exercising habeas corpus jurisdiction over the respondent's claim.²¹⁹ The Court held that there was

Ex parte Yerger, 75 U.S. (8 Wall.) at 101-02.

208. *Id.* at 105-06.

209. *Id.* at 106.

210. *See supra* Part I.E.3.

211. Duker, *supra* note 70, at 197.

212. *Id.*

213. *See, e.g., Ex parte Yerger* 75 U.S. (8 Wall.) at 104. The Court in *Yerger* can be understood as saying that the *McCardle* repeal was of little consequence, because the Court already had jurisdiction over the matter that was not dependent upon the repealed portion of the Habeas Corpus Act of 1867. Under this reading, the portion of the Habeas Corpus Act of 1867 granting the Court jurisdiction to hear appeals was redundant.

214. *INS v. St. Cyr*, 533 U.S. 289 (2001).

215. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1557 (2000)).

216. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 18 and 28 U.S.C.).

217. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified at 8 U.S.C. § 1101).

218. *St. Cyr*, 533 U.S. at 292-93.

219. *Id.* at 297.

jurisdiction to hear the petition,²²⁰ and delved into a discussion of the Suspension Clause as a constitutional guarantee of the writ of habeas corpus.²²¹

The majority noted that, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'"²²² Because of this baseline constitutional guarantee of the writ, combined with no clear congressional abrogation of jurisdiction as required by *Ex parte Yerger*,²²³ the Court held for the respondent.²²⁴

Justice Scalia, in his dissent, disagreed with the majority's interpretation of the Suspension Clause, and claimed to adopt Chief Justice John Marshall's interpretation of the Suspension Clause as put forth in *Bollman*.²²⁵ Justice Scalia argued that habeas corpus jurisdiction was entirely dependent on congressional statutory authorization, and that Congress could permanently abolish the writ, if it so chose, by stripping jurisdiction from the federal courts.²²⁶ Under Justice Scalia's view, the Suspension Clause only places limits on temporary suspension, and does not prohibit permanent abrogation of the writ.²²⁷ Justice Scalia invoked *Bollman* to bolster his point.²²⁸ The argument that the Suspension Clause places no prohibition on permanent congressional abrogation of the writ of habeas corpus via jurisdiction stripping has been called unprecedented in the history of the Supreme Court, but Justice Scalia is not that far from Chief Justice Marshall's position in *Bollman*.²²⁹

Thus, on the eve of the War on Terror, the Court had recognized that the Suspension Clause minimally guaranteed habeas corpus, without clearly defining that guarantee. The scope of that guarantee is important to the War on Terror cases discussed below, because the petitioners all make arguments that the executive has illegally suspended habeas corpus in violation of the Suspension Clause.

5. The War on Terror

On the morning of September 11, 2001, Al Qaeda operatives hijacked four commercial airliners flying out of Boston, Newark, and Washington,

220. *Id.*

221. *Id.* at 300-05.

222. *Id.* at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 664 (1996)).

223. *See supra* Part I.E.3.b.

224. *St. Cyr*, 533 U.S. at 297.

225. *See supra* Part I.E.1.

226. *St. Cyr*, 533 U.S. at 326-47.

227. *Id.* at 337 (Scalia, J., dissenting) ("A straightforward reading of [the Suspension Clause] discloses that it does not guarantee any content to (or even the existence of) the writ of habeas corpus, but merely provides that the writ shall not (except in case of rebellion or invasion) be suspended.").

228. *Id.* at 339-40; *see supra* Part I.E.1.

229. *See* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 Colum. Hum. Rts. L. Rev. 555, 559 (2002).

D.C.²³⁰ Two of these planes were flown into the World Trade Center in New York City, resulting in the collapse of the north and south towers and the deaths of 2986 people.²³¹ A third plane was flown into the Pentagon, killing 125 military and civilian personnel.²³² Passengers on the fourth plane, after learning of the attacks on the World Trade Center and the Pentagon, stormed the cockpit, forcing the hijackers to ground the plane in a field in Pennsylvania, killing all forty-four people on board.²³³ The national security apparatus of the United States was caught completely off-guard that morning, and its improvised responses to the hijackings proved ineffectual.²³⁴

On September 18, 2001, Congress passed the Authorization for Use of Military Force ("AUMF"), which gave the President the power to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons."²³⁵ Shortly thereafter, the United States invaded Afghanistan and began to use various components of its national security apparatus around the world to kill or detain individuals the United States believed to be affiliated with Al Qaeda.²³⁶

A number of individuals detained by the United States in the War on Terror have filed petitions for writs of habeas corpus in the federal courts. These petitions all argue that the President of the United States has illegally suspended habeas corpus through his illegal detention of the petitioners.

a. Rumsfeld v. Padilla

On May 8, 2002, Jose Padilla, a U.S. citizen with a violent past,²³⁷ was arrested on a material witness warrant issued by the U.S. District Court for the Southern District of New York²³⁸ as he stepped off a plane from Pakistan at Chicago's O'Hare International Airport.²³⁹ On June 9, 2002, while moving to vacate the material witness warrant through appointed counsel, Padilla was declared an "enemy combatant" by the President and was moved into military custody at the Consolidated Naval Brig in

230. The 9/11 Report, *supra* note 1, at 1-10.

231. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2635 (2004).

232. Wikipedia, September 11th Attacks, http://en.wikipedia.org/wiki/Casualties_of_the_September_11,_2001_attacks#Casualties (last visited Oct. 20, 2005).

233. *Id.*; see also The 9/11 Report, *supra* note 1, at 10-14.

234. The 9/11 Report, *supra* note 1, at 14-46.

235. Pub. L. No. 107-40, 115 Stat. 224 (2001).

236. The 9/11 Report, *supra* note 1, at 330-38.

237. Profile: Jose Padilla, BBC News, June 11, 2002, <http://news.bbc.co.uk/1/hi/world/americas/2037444.stm>.

238. The material witness warrant was issued by the court during an investigation of the September 11, 2001, Al Qaeda attacks. Rumsfeld v. Padilla, 124 S. Ct. 2711, 2712 (2004).

239. *Id.* at 2715.

Charleston, South Carolina.²⁴⁰ The President invoked his powers as Commander in Chief and his authority under the AUMF to justify the declaration.²⁴¹

On June 11, 2002, Padilla's counsel filed a petition of habeas corpus in the Southern District of New York under 28 U.S.C. § 2241.²⁴² The petition alleged violations of the Fourth, Fifth, and Sixth Amendments, and a violation of the Suspension Clause.²⁴³

The government moved to dismiss on procedural grounds, arguing that the proper respondent to the petition, the military commander of the naval brig, was not within the jurisdiction of the Southern District of New York.²⁴⁴ On the merits, the government argued that the President's powers as Commander in Chief and his authority under the AUMF legitimized the detention.²⁴⁵

The district court held that Defense Secretary Donald Rumsfeld was a proper respondent and within the jurisdiction of the court.²⁴⁶ Thus, jurisdiction in relation to the military commander of the Charleston brig was not an issue, but the Court agreed with the government as to the merits and let the detention stand.²⁴⁷ The Second Circuit reversed on the merits.²⁴⁸ The court ordered a writ of habeas corpus to issue and directed Secretary Rumsfeld to release Padilla within thirty days.²⁴⁹

The Supreme Court reversed and dismissed without prejudice on the basis that the Southern District of New York had no jurisdiction to issue a writ of habeas corpus.²⁵⁰ The Court held that, when a habeas corpus petitioner is detained within the jurisdiction of a federal district court, the proper forum is the district court that has jurisdiction over the immediate custodian of the detainee.²⁵¹ The Court held that the District of South Carolina was the proper forum, because it had jurisdiction over Padilla's "immediate custodian," the military commander of the brig where Padilla was detained.²⁵² By disposing of the case through a territorial jurisdiction requirement centered on the detainor, the Court never reached the Suspension Clause argument it had last dealt with in *St. Cyr*.

240. *Id.* at 2715-16.

241. *Id.* at 2715.

242. *Id.* at 2716; *see supra* note 33.

243. *Padilla*, 124 S. Ct. at 2716.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 2717.

249. *Id.*

250. *Id.* at 2727.

251. *See id.* at 2718 n.9.

252. *Id.* at 2727.

b. *Rasul v. Bush*

The question whether United States courts have jurisdiction to entertain petitions for habeas corpus from detainees held outside the territorial jurisdiction of the federal district courts arose in *Rasul v. Bush*.²⁵³ The Court held that such jurisdiction, in this case over the detention center operated by the United States Navy at Guantanamo Bay, Cuba, was proper.²⁵⁴

Rasul involved “2 Australian citizens and 12 Kuwaiti citizens who were captured abroad during hostilities between the United States and the Taliban.”²⁵⁵ The detainees filed various actions in the U.S. District Court for the District of Columbia, challenging their detention at the naval base at Guantanamo Bay.²⁵⁶ The district court construed all the actions as petitions for writs of habeas corpus and dismissed for want of jurisdiction, and the D.C. Circuit affirmed²⁵⁷ on the basis of the World War II era case of *Johnson v. Eisentrager*.²⁵⁸

Eisentrager involved twenty-one German soldiers who engaged in espionage against the United States in China, after the surrender of Germany in World War II.²⁵⁹ Tried by a military commission in China, six were acquitted and the rest were sent to Germany to serve their sentences.²⁶⁰ The soldiers’ habeas corpus petitions were ultimately denied by the Supreme Court on the basis of a lack of jurisdiction, because the soldiers were outside the sovereign territory of the United States.²⁶¹

Despite the *Eisentrager* holding, the *Rasul* Court held that jurisdiction over the detention center at Guantanamo Bay was proper.²⁶² The Court stated that the Suspension Clause explicitly recognized the writ in the Constitution and that, historically, the writ’s protections were strongest when reviewing the legality of executive detention.²⁶³ The Court then framed the jurisdictional question as “whether the habeas statute [28 U.S.C. § 2241] confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not ‘ultimate sovereignty.’”²⁶⁴

In answering this jurisdictional question in the affirmative, the Court distinguished *Eisentrager* by noting that (1) *Rasul*, unlike *Eisentrager*, did not involve soldiers affiliated with nation-states; (2) the *Rasul* detainees

253. 124 S. Ct. 2686, 2690 (2004).

254. *Id.* at 2690, 2699.

255. *Id.* at 2690.

256. *Id.* at 2691.

257. *Id.*

258. 339 U.S. 763 (1950).

259. *Id.* at 765-66.

260. *Id.* at 766.

261. *Id.* at 790-91.

262. *Rasul*, 124 S. Ct. at 2692.

263. *Id.*

264. *Id.* at 2693 (citation omitted).

denied plotting against the United States; (3) the *Rasul* detainees were never charged or tried in front of any type of tribunal; and finally (4) the *Rasul* detainees had been held for more than two years "in territory over which the United States exercises exclusive jurisdiction and control."²⁶⁵

Whereas *Rasul* and *Padilla* dealt purely with habeas corpus jurisdiction, the case of *Hamdi v. Rumsfeld* partially reached the merits. For the first time in Supreme Court history, *Hamdi* laid out a balancing test for evaluating an executive detention in wartime.

c. *Hamdi v. Rumsfeld*

In *Hamdi v. Rumsfeld*²⁶⁶ the parties stipulated that there was no suspension of habeas corpus.²⁶⁷ The main issue was what sort of habeas corpus due process analysis the petitioner, Hamdi, was entitled to. The Court held that Hamdi was entitled to a *Mathews v. Eldridge* due process analysis.²⁶⁸

Justice Scalia deplored the application of the *Eldridge* analysis to Hamdi's case,²⁶⁹ and argued that Hamdi should be promptly released unless criminal charges were brought or Congress suspended habeas corpus.²⁷⁰ If Congress suspends habeas corpus, Justice Scalia asserted, it suspends judicial review of executive detentions.²⁷¹ For Justice Scalia, as for Chief Justice Marshall in *Bollman*, Congress has complete control over habeas corpus jurisdiction and there is no effective constitutional guarantee of federal habeas corpus jurisdiction. For both Scalia and Marshall, habeas corpus is a constitutional privilege, albeit one that Congress must effectuate.²⁷² Justice Scalia acknowledged some constitutional basis to habeas corpus jurisdiction in *Hamdi* and *St. Cyr*, but argued that the Suspension Clause only applied to temporary suspensions and not permanent suspensions.²⁷³

265. *Id.*

266. 124 S. Ct. 2633 (2004).

267. *Id.* at 2636.

268. *Hamdi*, 124 S. Ct. at 2646 ("Mathews dictates that the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." (citing *Mathew v. Eldridge*, 424 U.S. 319 (1976))).

269. *Id.* at 2672 (Scalia, J., dissenting).

270. *Id.* at 2671.

271. *Id.* at 2665-66 ("When the writ is suspended, the government is entirely free from judicial oversight.").

272. Compare *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807), with *INS v. St. Cyr*, 533 U.S. 289, 337-40 (2001) (Scalia, J., dissenting).

273. *St. Cyr*, 533 U.S. at 337-38. (Scalia, J., dissenting).

II. THE SUSPENSION CLAUSE AND THE WAR ON TERROR: JURISDICTIONAL AND PROCEDURAL ISSUES

Any suspension of habeas corpus turns on the jurisdictional and procedural interpretation of the Suspension Clause. The main jurisdictional question in Part II is whether the Suspension Clause functions as a constitutional grant of federal habeas corpus, or if federal habeas corpus jurisdiction requires congressional authorization. If there is no constitutional guarantee of habeas corpus, then Congress can effectively suspend habeas corpus by stripping the federal courts of habeas corpus jurisdiction in a manner similar to that in *McCardle*.²⁷⁴ On the side of the Suspension Clause standing as a constitutional guarantee of habeas corpus jurisdiction are Justice Taney in *Merryman*,²⁷⁵ the *Milligan*²⁷⁶ Court, and the *St. Cyr*²⁷⁷ majority; on the side of federal habeas corpus requiring congressional authorization are Justice Marshall in *Ex parte Bollman*²⁷⁸ and Justice Scalia in *St. Cyr*.²⁷⁹ Furthermore, the argument has been made that the Suspension Clause only refers to state habeas corpus, and thus there is no constitutional grant of federal habeas corpus jurisdiction.²⁸⁰

The main procedural question in this part asks how the Suspension Clause functions. Does it suspend all judicial review of executive detentions, as Justice Scalia argued it does in his *Hamdi* dissent, or does suspension still allow for judicial review to see if the privilege of the writ is suspended for the detainee in question, like in *Merryman*, *Milligan*, and *Yerger*?

Procedurally, a writ of habeas corpus traditionally can serve two functions: either as a writ that is directed against a detainor seeking justification for a detention, or as a writ that frees or bails a detainee. This dual procedural function is codified in 28 U.S.C. § 2243, the federal habeas corpus procedure statute, which allows a judge to either direct a writ of habeas corpus at a detainor, or enter an order to show cause why the writ should not issue. Thus, part of the disagreement about how the Suspension Clause functions is a disagreement about how habeas corpus functions.

Once the general questions regarding the Suspension Clause are answered, there still remains the question of whether habeas corpus should and can be suspended for the War on Terror. However one interprets the Suspension Clause, there are difficult issues to be faced with any implicit or explicit suspension of habeas corpus for the War on Terror. Is the threat from Al Qaeda a “rebellion or invasion?” Does the “public safety” require suspension? How would suspension of habeas corpus for the War on Terror function? Before these fact-specific questions can be explored, the

274. See *supra* Part I.E.3.a.

275. *Ex parte Merryman*, 17 F. Cas. 144, 150-52 (C.C.D. Md. 1861) (No. 9487).

276. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 130-31 (1866).

277. *St. Cyr*, 533 U.S. at 300-04.

278. 8 U.S. (4 Cranch) 75, 94 (1807); see *supra* Part I.E.1 (discussing *Ex parte Bollman*).

279. See *St. Cyr*, 533 U.S. at 337-38.

280. Duker, *supra* note 70, at 126.

more general questions of Suspension Clause jurisdiction and procedure require examination.

A. Federal Habeas Corpus Jurisdiction: Constitutional or Statutory?

In response to counsels' argument that the Suspension Clause functioned as a constitutional guarantee that conferred habeas corpus jurisdiction upon the court, Chief Justice Marshall, in dictum in *Ex parte Bollman*,²⁸¹ argued that a congressional statutory grant was required to give "life" to that guarantee.²⁸² For Chief Justice Marshall, federal habeas corpus was guaranteed by the Constitution, but required congressional authorization, because the United States is a nation of written laws and thus any federal habeas corpus jurisdiction required written authorization.²⁸³ Justice Scalia relied on this dictum in his dissent in *INS v. St. Cyr*²⁸⁴ to bolster his argument that Congress, at its whim, could totally abrogate federal jurisdiction over habeas corpus.²⁸⁵ For Scalia in *St. Cyr*, the Suspension Clause only applies to temporary suspensions, and does not prevent Congress from permanently abrogating habeas corpus.²⁸⁶

If the Suspension Clause is not a constitutional guarantee of habeas corpus, then Congress may, under Justice Scalia's view, suspend judicial review of executive detentions at its will, as well as effectively suspend the writ by not providing federal habeas corpus jurisdiction.²⁸⁷ If the Suspension Clause does act as a constitutional guarantee of habeas corpus, then there are limitations to Congress's jurisdiction over federal habeas corpus, and by extension over any congressional suspension of habeas corpus.

The majority in *St. Cyr* took a different view of Marshall's dictum from *Bollman*, arguing that Marshall was merely elucidating the fact that the Suspension Clause obligated Congress to provide for the writ of habeas corpus.²⁸⁸ Under the majority's view in *St. Cyr*, the Suspension Clause acts as a minimal constitutional guarantee of the writ of habeas corpus. The majority's view in *St. Cyr* is consistent with the Court's position in *Yerger*, and what the Court hinted at in *McCardle*: that the Suspension Clause is a constitutional guarantee of federal habeas corpus jurisdiction because it is the only named privilege in the Constitution.²⁸⁹

281. *Ex parte Bollman*, 8 U.S. (4 Cranch) at 96-97.

282. *Id.* at 95; see *supra* note 123 and accompanying text.

283. *Ex parte Bollman*, 8 U.S. (4 Cranch) at 93-94.

284. 533 U.S. at 339-40. See *supra* Part I.E.4 for a discussion of *St. Cyr*.

285. *St. Cyr*, 533 U.S. at 337.

286. *Id.*

287. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2665-66 (2004) (Scalia, J., dissenting).

288. *St. Cyr*, 533 U.S. at 304 n.24 ("Indeed, Marshall's comment expresses the far more sensible view that the [Suspension] Clause was intended to preclude any possibility that the privilege itself would be lost by either the inaction or the action of Congress." (internal quotation omitted)). For a version of this argument, see Neuman, *supra* note 229, at 599-600.

289. See *supra* Part I.E.1-4.

1. Does the Suspension Clause Refer Only to State Habeas Corpus?

Another argument against constitutional federal habeas corpus jurisdiction is that the framers only meant the Suspension Clause to apply to state habeas corpus, and that they were not considering the existence of federal habeas corpus at all.²⁹⁰ This view depends on how one interprets the records of the Federal Convention, the Suspension Clause's initial placement in Article III, federal habeas corpus jurisdiction being conferred in the Judiciary Act of 1789, and the Supreme Court's early assertion of habeas corpus jurisdiction in 1796, despite jurisdictional questions that were not finally resolved until *Bollman* in 1807. These factors are weighed in Part III.

2. The Functioning of the Suspension Clause

The question here is procedural. How does suspension of the "Privilege of the Writ of Habeas Corpus"²⁹¹ function? Is judicial review suspended, or is there at least judicial review of executive detention to determine if the suspension of the privilege applies to the detainee?

The Suspension Clause is procedurally ambiguous.²⁹² It reads, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."²⁹³ The ambiguity results from the fact that it is unclear if it is the writ that is the privilege that cannot be suspended, or if it is the writ's privilege that cannot be suspended.²⁹⁴ The latter reading is how suspension of habeas corpus was generally approached under the English common law and various habeas corpus suspension acts, and is probably how the framers understood suspension to work.²⁹⁵

Under the latter view, whereas the relief (bail or complete release) to be obtained by the writ may be congressionally suspended, the writ itself may issue, and upon the return the court may evaluate the constitutionality of any suspension and determine if the petitioner is in the class of persons for whom the writ is suspended. This is the view adopted by the Supreme Court in *Merryman* and *Milligan*.²⁹⁶ Justice Scalia's argument in *Hamdi* that suspension of habeas corpus suspends judicial review is opposed to this view.²⁹⁷

290. See, e.g., Duker, *supra* note 70, at 126-35.

291. U.S. Const. art. I, § 9, cl. 2.

292. *St. Cyr*, 533 U.S. at 337 (Scalia, J., dissenting); see *supra* Part I.E.4.

293. U.S. Const. art. I, § 9, cl. 2.

294. See *supra* notes 156-60 and accompanying text.

295. See *supra* Part I.A-C; *supra* note 160.

296. See *supra* Part I.E.2.

297. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2665-66 (2004) (Scalia, J., dissenting).

3. Who Can Suspend?

Does Congress have the sole power to suspend habeas corpus, and does the President lack any constitutional power to suspend habeas corpus, even when there is a threat to the public safety when Congress is not in session? Historically, the President has suspended habeas corpus when Congress was not in session, and when he felt it was necessary.²⁹⁸

The Constitution does not specifically say that only the legislature may suspend the writ of habeas corpus; this view is derived from a structural reading. The power to suspend is listed in Article I, which deals with the powers of Congress. Note, however, that while the Suspension Clause appears in Article I, Section 9, which lists limitations on congressional power, the effect is that of a positive power. It is a limited grant of a power to suspend. The Suspension Clause was moved at the last minute to Article I, Section 9, Clause 2.²⁹⁹ There are no records of why this move was made.

The word "legislature" was included in a draft of the Suspension Clause, but the word was removed before the Federal Convention moved the Suspension Clause to what would become Article III, which deals with the federal judiciary.³⁰⁰ The placement of the Suspension Clause in Article I, Section 9, which limits congressional power, does not by itself prove that the executive has no suspension powers.³⁰¹

At common law, however, only Parliament could suspend habeas corpus.³⁰² Furthermore, the entire Suspension Clause case line assumes that only Congress may constitutionally suspend habeas corpus.³⁰³ Because of these facts, it is generally accepted that only Congress may suspend habeas corpus.³⁰⁴

Nothing in the Constitution, however, explicitly denies the power of the President to suspend habeas corpus. An argument could be made that the President has the power to suspend as a necessary part of his war powers, given the underlying national security concerns of the Constitution.³⁰⁵ The Suspension Clause only says that habeas corpus may not be suspended except in cases of rebellion or invasion where the public safety requires it.³⁰⁶ Despite its placement in a section which lists limitations to congressional power, it is arguable that it was placed in Article I, Section 9, to guarantee Congress the power to suspend habeas corpus, rather than to protect habeas corpus, given the Federal Convention's near obsession with

298. See *supra* Part I.D.

299. See *supra* Part I.C.

300. See *supra* Part I.C.

301. U.S. Const. art. I.

302. See *supra* Part I.A.

303. See *supra* Part I.E.1-4.

304. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2655 (2004); *Ex parte Merryman*, 17 F. Cas. 144, 151-52 (C.C.D. Md. 1861) (No. 9487).

305. See *supra* Introduction, Part I.B.

306. U.S. Const. art. I, § 9, cl. 2.

Shays' Rebellion.³⁰⁷ Under this view, the placement in Section 9 rather than in Article I, Section 8, which list-positive congressional powers, is a bit disingenuous, but perhaps there was a concern that explicitly giving Congress the power to suspend habeas corpus would lend ammunition to opponents of the Constitution, who feared it would be an instrument of tyranny and dictatorship.³⁰⁸

Finally, if habeas corpus can only be suspended by Congress, does this mean that suspension cannot occur if Congress is not in session, even if an invasion or rebellion occurs and the public safety requires it? This is difficult to reconcile with the national security underpinnings of the Constitution, which centralized military command and control.³⁰⁹ The last minute placement of the Suspension Clause in Article I, Section 9,³¹⁰ is arguably ill-considered if a threat to the public safety requiring suspension occurs when Congress is not in session or is unable to meet, say because someone has flown a plane into the Capitol.³¹¹

Once the general jurisdictional and procedural questions that apply to any use of the Suspension Clause are answered, factual questions arise as to the Suspension Clause's application to the War on Terror.

B. *Suspension and the War on Terror*

Is the War on Terror a case of "Rebellion or Invasion" that requires suspension of habeas corpus for the "public safety?"³¹² Has Al Qaeda rebelled against or invaded the United States? Is Al Qaeda a threat to public safety? If habeas corpus should be suspended because of Al Qaeda, how long should such a suspension last? How should it be structured? Should it be suspended for all persons, or just a class of persons?

1. *Rebellions, Invasions, and the Public Safety*

The framers had Shays' Rebellion foremost in their mind when they drafted the Suspension Clause, followed by the threats posed by foreign powers and Native Americans.³¹³ Unlike the War on Terror, all these threats were particularized and geographically defined: a domestic rebellion near Springfield, Massachusetts, led by Revolutionary War veteran Daniel Shays; the British lingering in the Northwest Territory and controlling Canada; the Spanish in Florida and on the Mississippi; and various Native American tribes (being egged on by European powers) engaged in frontier fighting with the states.³¹⁴ The type of warfare the

307. *See supra* notes 64-74 and accompanying text.

308. *See supra* note 80.

309. *See supra* Part I.A.

310. *See supra* Part I.D.

311. Congress was not in session at the outbreak of the Civil War, when President Lincoln suspended the writ. *See supra* note 129 and accompanying text; *supra* Part I.E.2.

312. *See* U.S. Const. art. I, § 9, cl. 2.

313. *See supra* Part I.B.

314. *See supra* Part I.B.

framers were familiar with involved a series of battles between relatively well-defined sides at particular geographic locales for finite periods of time; the American Revolution, the French and Indian War, and the frontier warfare with the Native Americans are all examples of this.

This is different than the War on Terror, which is in part a war of instantaneous, catastrophic events like the attacks of September 11, 2001. Al Qaeda struck, and their agents willfully killed themselves by attacking, leaving behind no occupying army or ongoing threat to the government. This is not to say that there are not traditional types of battle in the War on Terror. Afghanistan is an example of this. But the threat posed by Al Qaeda is not the traditional one the United States has faced either from other nation-states or Native American tribes. Al Qaeda relies primarily on small groups of people who bide their time planning and preparing, often in the nation they are going to attack. When the time is right, generally the agents launch a suicide attack that aims for the highest amount of casualties; civilian or military, Al Qaeda makes no distinction.³¹⁵

Al Qaeda is more an ideology of Jihad, motivating and linking a series of disparate cells and individuals around the world. The War on Terror is not only being fought on battlefields in places like Afghanistan, but also at airports where United States citizens are detained as enemy combatants, because they allegedly trained with Al Qaeda and were returning to the United States to set off a radioactive bomb.³¹⁶

The fluid nature of the threat posed makes it difficult to characterize the War on Terror as either a case of rebellion or invasion. While some alleged Al Qaeda operatives are U.S. citizens,³¹⁷ there is no concerted action by U.S. citizens threatening public safety like that which the framers were so concerned about as a result of Shays' Rebellion,³¹⁸ the Whiskey Rebellion,³¹⁹ or domestic insurrectionary actions of Confederate sympathizers like Merryman.³²⁰

Al Qaeda also has not mounted any kind of invasion of the United States with an organized army. They have only mounted limited attacks, aimed at creating terror and economic disruption. These attacks have been small in number and spread out over a period of over a decade, and often have been against U.S. interests far from the mainland.³²¹

315. See *supra* note 1 and accompanying text.

316. See *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2715 (2004).

317. *Id.*

318. See *supra* notes 63-64 and accompanying text.

319. In 1794, inhabitants of western Pennsylvania rebelled when federal tax collectors attempted to collect on a federally imposed whiskey tax. President Washington, accompanied by Alexander Hamilton, led an army of almost 15,000 militiamen (an army larger than that of the Revolutionary War) against the rebels to suppress the insurrection. The Rebels dispersed in the face of Washington's army. 1 Brinkley, *supra* note 86, at 208. The incident gave rise to the first habeas corpus case to come before the Supreme Court. *United States v. Hamilton*, 3 U.S. (3 Dall.) 17 (1795); see *supra* Part I.E.1.

320. See *supra* Part I.E.2.

321. See *supra* note 20 and accompanying text.

There is, of course, the danger that a future attack could be catastrophic, such as if a plane were flown into a nuclear power plant, but such a catastrophic attack would not constitute an "Rebellion or Invasion" under a strict reading of the clause, because no army is conquering any territory and no armed domestic group is trying to overthrow the government. Any strict constructionist, textualist, or originalist reading of the Suspension Clause applied to the War on Terror presents the problem of how to characterize Al Qaeda's threat as either an "Rebellion or Invasion." A more liberal reading of the clause would focus on the threat to the public safety posed by Al Qaeda to justify classifying the threat as an "Invasion or Rebellion." Such a reading must explain its move away from grounding interpretation of the Suspension Clause in its explicit requirements.

2. The Lengths and Limits of Suspension of Habeas Corpus

The Constitution, by using the word suspension, implies that the suspension of the writ will be temporary, as has historically been the case.³²² But of what use is any temporary suspension in a war that our adversaries have vowed to fight over centuries?³²³ In light of the long term and deadly threat from Al Qaeda that the United States faces,³²⁴ if suspension of habeas corpus is utilized in the War on Terror, what would be the proper duration of the suspension? Furthermore, beyond the question of a temporal limitation on any suspension, should other limitations be put on the suspension, as was the case during the Civil War when the Executive Branch was required to maintain and report lists of its detainees to the judiciary?³²⁵ Does the Constitution impose any limits?

III. SUSPENDING HABEAS CORPUS FOR THE WAR ON TERROR

The following section argues that the privilege of the writ of habeas corpus is constitutionally guaranteed, suspension of habeas corpus is justified for the War on Terror because of the threat to public safety posed by Al Qaeda and the weakening of the rule of law by an executive that ignores habeas corpus, suspension does not preclude judicial review of executive detentions, any suspension should be limited temporally and statutorily and require regular renewal, and the courts should vigorously defend their constitutional habeas corpus jurisdiction, even when the executive flouts it.

322. See, e.g., An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, 17 Stat. 15 (1871) (codified as amended at 42 U.S.C. § 1986 (2000)) (allowing for suspension of habeas corpus only until the next session of Congress).

323. See *supra* note 19 and accompanying text.

324. See *supra* notes 19-20 and accompanying text.

325. See *supra* note 145.

A. *Federal Habeas Corpus Jurisdiction Is Constitutionally Guaranteed*

At one point at the Federal Convention, delegate John Rutledge of South Carolina declared that the writ of habeas corpus should be inviolable in the new government.³²⁶ This was in the context of arguing against allowing for any suspension of habeas corpus under the Constitution, and underscores how strongly the framers felt about habeas corpus. It is not a coincidence, in a document so meticulously considered at the Federal Convention, that the writ of habeas corpus is the only named privilege in the Constitution. The fact that it is named underscores that the framers thought it exceptionally important.

The Suspension Clause may have been drafted as much to ensure the power to suspend habeas corpus as to grant constitutional habeas corpus. Concern over Shays' Rebellion and foreign threats ran high.³²⁷ But Alexander Hamilton viewed the Suspension Clause as a constitutional guarantee of habeas corpus,³²⁸ and he would have been familiar with it by virtue of sitting on the Committee of Style that made the last minute move of the Suspension Clause to Article I.³²⁹ Presumably, the Committee of Style discussed the Suspension Clause before moving it to Article I.³³⁰ Moreover, an early draft of the Suspension Clause that tracks the Bill of Rights appears in an enumeration of rights that the delegates at the Convention considered inserting into the Constitution.³³¹ Habeas corpus was the only privilege from this early enumeration of rights that made it into the Constitution; the rest would later either turn up in the Bill of Rights or would be inserted structurally into the Constitution. The greater weight given to habeas corpus by the framers is evidence that they considered habeas corpus fundamental. Furthermore, the framers' conception of the suspension of habeas corpus followed the common law and the English suspension acts, because the language of the constitution mirrors the procedure of suspension in England.³³²

1. It Is Only the Privilege of the Writ that Is Suspended

Habeas corpus did not emerge newborn at the Federal Convention.³³³ Under the habeas corpus suspension acts, and the English common law, it was the privilege of the writ of habeas corpus that was suspended, not the

326. See *supra* note 75.

327. See *supra* Part I.B-C.

328. The Federalist No. 84 (Alexander Hamilton), *supra* note 2, at 479 ("The establishment of the writ of *habeas corpus* [and] the prohibition against *ex post facto* laws . . . are perhaps greater securities to liberty and republicanism than any [the Constitution] contains.").

329. See *supra* Part I.C.

330. See *supra* Part I.C.

331. See *supra* note 72 and accompanying text.

332. See *supra* Part I.A.

333. See *supra* note 30 and accompanying text.

writ itself.³³⁴ A court could still review a petition for habeas corpus to see if the detainee was in the class of people for whom the writ was suspended. In other words, suspension of the privilege of the writ did not necessarily suspend judicial review. It was against this background that the framers wrote the Suspension Clause.³³⁵

Justice Scalia argued in his *INS v. St. Cyr* dissent that habeas corpus is dependent upon jurisdiction conferred by Congress, and that when Congress suspends habeas corpus there is no judicial review.³³⁶ But this Suspension Clause interpretation is at odds with the English suspension acts and the common law history of the functioning of habeas corpus review, under which executive detentions could be judicially reviewed to see if the privilege of habeas corpus was suspended for the detainee.³³⁷ Under the English suspension acts, the common law, and the Suspension Clause case line reviewed above, the courts have exercised some degree of judicial review over the detentions when the executive has effectively sought to avoid habeas corpus, whether the detainees were civilian or military.

Furthermore, Justice Scalia's argument in *St. Cyr* that the Suspension Clause only pertains to temporary suspensions of habeas corpus and not to permanent ones, and that therefore Congress may abrogate habeas corpus by not providing for federal habeas corpus jurisdiction, has no historical support.³³⁸ There has never been a permanent suspension, or even a prolonged suspension, of habeas corpus in Anglo-American case law. There was a time when the writ did not exist, but as long as it has existed, it has only been suspended irregularly and for short periods of time.³³⁹

It follows from the constitutional guarantee of habeas corpus that any suspension of the privilege of the writ of habeas corpus by Congress does not suspend due process by rendering "the Government . . . entirely free from judicial oversight."³⁴⁰ Any suspension of habeas corpus is subject to judicial review to ensure the suspension is constitutional. This is precisely the point made in *Ex parte Merryman*³⁴¹ and *Ex parte Milligan*³⁴² and is why the Suspension Clause as a constitutional guarantee of habeas corpus is a constant theme in the line of cases surveyed in this Note.³⁴³

From this reading it follows that Justice Marshall's dictum in *Bollman*,³⁴⁴ that there is no writ of habeas corpus without congressional authorization, needs to be read as the majority in *St. Cyr* read it, that is, as something

334. See *supra* note 160; *supra* Part I.A.

335. See *supra* Part I.A-D.

336. See *supra* notes 287-88 and accompanying text.

337. See *supra* Part I.A.

338. See *INS v. St. Cyr*, 533 U.S. 289, 337 (2001).

339. See *supra* Part I.

340. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2665-66 (2004) (Scalia, J., dissenting).

341. See *supra* note 141 and accompanying text.

342. See *supra* note 156 and accompanying text.

343. See *supra* Part I.E.1-5.

344. See *supra* note 123 and accompanying text.

Congress was obligated to do under the Constitution.³⁴⁵ This reconciles Chief Justice Marshall's dictum that habeas corpus is a constitutional privilege guaranteed by the Suspension Clause with his dictum that congressional authorization is necessary to give the privilege "life."³⁴⁶ This view, of course, is predicated on the framers not intending the Suspension Clause to refer to state habeas corpus.

2. State Habeas Corpus

Federal habeas corpus jurisdiction was immediately established by Congress, of which many framers were members, by the Judiciary Act of 1789.³⁴⁷ This suggests that habeas corpus was viewed as fundamental by the framers and the first Congress, because the first Congress granted habeas corpus jurisdiction in section 14 of the Act.³⁴⁸ Furthermore, the Suspension Clause's initial placement in Article III suggests that the framers intended there to be federal habeas corpus, because Article III deals exclusively with federal court jurisdiction.³⁴⁹ Also, if federal habeas corpus was a radical notion, one would expect the Supreme Court to discuss the matter when they issued the Court's first writ in 1796. Instead, the writ was issued with no discussion of the Court's jurisdiction, despite questions about the congressional grant of habeas corpus jurisdiction that were not resolved until *Bollman* in 1807.

A federalism argument can also be directed at the view that the framers were only concerned with state habeas corpus in drafting the Suspension Clause. The Federal Convention was a debate and compromise between different state interests. If the states thought that they were giving up state control of habeas corpus to the federal government, ratification would have been a harder sell to the states that were jealously guarding their sovereignty.³⁵⁰ All of these factors weigh against the view that the framers drafted the Suspension Clause with only the state habeas corpus in mind.

3. Only Congress May Suspend Habeas Corpus

The Suspension Clause's placement in Article I, the common law, the English suspension acts, and each of the Suspension Clause cases all support the view that only Congress may suspend habeas corpus.³⁵¹ The argument based on Article I is simple. If the framers had meant to grant the executive power to suspend, one would expect there to be a Suspension Clause in Article II, which deals with presidential powers. Under the

345. See *supra* Part I.E.4.

346. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807).

347. Judiciary Act of 1789, ch. 20, 1 Stat 73 (1789) (codified as amended at 28 U.S.C. §§ 2241-2255 (2000)).

348. *Id.*

349. See *supra* note 77 and accompanying text.

350. See 1 Farrand, *supra* note 22 (noting that states were jealous of their sovereignty).

351. See *supra* Part I.

common law and the English suspension acts, only the legislature could suspend habeas corpus, a fact that has never been judicially questioned in any of the Suspension Clause cases reviewed in this Note.³⁵²

The argument that the President should be able to suspend habeas corpus for public safety reasons while Congress is not in session³⁵³ can be dismissed by noting that the President still has the power to detain while Congress is not in session. The President could hold a detainee until Congress reconvenes and decides whether habeas corpus should be suspended, and thus the President's ability to detain during a threat to public safety remains unhindered by the fact that only Congress can suspend habeas corpus.

Finally, it should be noted that President Lincoln's suspension of habeas corpus, the only major unauthorized executive suspension of habeas corpus in United States history, was authorized by Congress, albeit *ex post*.³⁵⁴

B. Habeas Corpus Should Be Suspended for the War on Terror

The threat from Al Qaeda justifies suspending habeas corpus during the War on Terror for public safety reasons and to maintain the rule of law. Al Qaeda engages in unconventional warfare that makes no distinction between civilian and military targets, and seeks the largest number of casualties possible. While Al Qaeda cannot strictly be said to have rebelled or invaded as technically required by the Suspension Clause for there to be a suspension, there can be little doubt that the threat to the public safety by a successful Al Qaeda attack is great. If the government is right, and Jose Padilla, a United States citizen, was entering the United States to set off a radioactive bomb, the results could have been catastrophic.³⁵⁵ The United States government should not have to worry about procedural niceties in the face of catastrophic threats to the public safety, a situation the Suspension Clause was designed to deal with.³⁵⁶

The argument for suspension of habeas corpus for the War on Terror is mainly one of resource allocation. The government should be spending its resources defending the United States from the types of Al Qaeda attacks that Padilla allegedly was attempting, rather than defending its actions against the full panoply of protections afforded criminal defendants by federal criminal procedure, rules of evidence, and case law. Suspension of habeas corpus would free up government resources for the War on Terror.

This is not to argue that the executive should be given *carte blanche* power to detain individuals it believes are involved in the War on Terror. The potential for an Executive Branch that abuses its power or erroneously detains someone has not disappeared because of the War on Terror. As

352. See *supra* Part I.E.1-5.

353. See *supra* Part II.A.3.

354. See *supra* Part I.E.2.

355. See *supra* Part I.E.5.a.

356. See *supra* Part I.D.

argued below, suspension of habeas corpus should not grant the executive the power to detain without judicial review. But in an unconventional war, where civilians launch deadly attacks against the state, which has no precise geographical boundaries, and where soldiers (to use the term loosely) are not often identified as such until after the fact (as was the case with the September 11 hijackers), the executive should be given greater latitude to deal with the unconventional nature of the threat faced. The Suspension Clause was drafted to give the executive precisely this type of latitude in the face of threats to national security.³⁵⁷

Suspension of habeas corpus, by preserving the rule of law, would also serve to delineate the values embedded in the Constitution from those of Al Qaeda, and provide an answer to any criticism that unilateral executive detentions subvert the rule of law. Suspension of habeas corpus, as authorized by Congress, would provide a constitutional basis for detentions in the War on Terror, and deter criticism that the rule of law is being cast aside. The rule of law, it could be argued, is what is being protected by a constitutional suspension by Congress of habeas corpus, because the suspension is being used as a means to protect the rule of law from those who seek to destroy it.

1. Congress Should Authorize a Temporally and Statutorily Limited Suspension for the War on Terror

Like the previous congressional authorizations for the suspension of habeas corpus during the Civil War, any suspension for the War on Terror should contain a sunset provision and should be limited in scope.³⁵⁸ The temporal length of the suspension could be as simple as that used during Reconstruction, where suspension was only authorized until the next regular session of Congress.³⁵⁹ Furthermore, similar to the suspension of habeas corpus during the Civil War, lists of those detained should be turned over to Congress or the judiciary for review, with an eye towards preventing abuse.³⁶⁰

Suspension could also be tailored to operate in such a way that it is only functional if detainees are treated according to the Geneva Conventions.³⁶¹ Those prisoners not held in accordance with the Geneva Conventions would not be subject to the suspension of habeas corpus.

357. See *supra* Part I.D.

358. See *e.g.*, An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, 17 Stat. 15 (1871).

359. *Id.*

360. See *supra* Part I.E.2-3.

361. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

2. The Federal Courts Should Vigorously Defend Their Habeas Corpus Jurisdiction

There is little that the judiciary can do if the executive chooses to unilaterally suspend habeas corpus and ignore any such writs issued by the courts, except protest loudly for press and for posterity, like Justice Taney in *Ex parte Merryman*.³⁶² Structurally, in such a case, the power is with Congress to enforce the Suspension Clause through the power of the purse, impeachment, or ex post authorization, as was the case during the Civil War.³⁶³

The power of adverse publicity upon an executive that has unilaterally suspended habeas corpus should not be discounted. *Merryman*, *Milligan*, and *Hamdi* share the characteristic that the detainees in question were all quietly released because of the storm of publicity that the cases engendered.³⁶⁴ Moreover, a court's ineffective protest in the present tense may serve as an effective precedent when future generations look to the past to see how suspension was handled.

CONCLUSION

The Suspension Clause constitutionally guarantees federal habeas corpus jurisdiction, and it is only the privilege of the writ that may be suspended, as was the practice under the habeas corpus suspension acts, the common law, and throughout United States history. Suspension of habeas corpus is justified by the grave threat to the public safety posed by Al Qaeda. Suspension of habeas corpus should be temporally limited by sunset clauses and limiting provisions similar to those used in the Reconstruction Act, which required lists of all those detained during a suspension to be provided to the courts. Finally, the judiciary should be vociferous whenever the executive ignores habeas corpus, in the hope that the adverse publicity will force the executive branch into de facto compliance, as has historically often been the case.

362. See *supra* Part I.E.2.a.

363. See *supra* Part I.E.

364. See *supra* Part I.E.2.a-b, Part I.E.4.

Notes & Observations